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O PRODUCT EDUCATION HEALTH PROTECTION F 1991, S. 1088

HEARING

BEFORE THE

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OF THE

MITTEE ON COMMERCE, CE, AND TRANSPORTATION ITED STATES SENATE

E HUNDRED SECOND CONGRESS

FIRST SESSION

NOVEMBER 14, 1991

of the Committee on Commerce, Science, and Transportation

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S. HRG. 102-924

TOBACCO PRODUCT EDUCATION AND HEALTH PROTECTION ACT OF 1991, S. 1088

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BEFORE THE

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OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

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TOBACCO PRODUCT EDUCATION AND HEALTH PROTECTION ACT OF 1991, S. 1088

THURSDAY, NOVEMBER 14, 1991

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER OF THE COMMITTEE ON
COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met at 9:35 a.m. in room SR–253, Russell Senate Office Building, Hon. Richard Bryan (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Moses Boyd, senior counsel; and Alan Maness, senior staff counsel, and Robert M. Bry, minority professional staff member.

OPENING STATEMENT OF SENATOR BRYAN

Senator BRYAN. Let me take this opportunity to welcome all of you to this hearing on S. 1088, The Tobacco Product Education and Health Protection Act of 1991. As most of you know, this legislation has been reported by the Committee on Labor and Human Resources, and was then subsequently or, I should say, sequentially referred to the Commerce Committee, until the end of calendar year 1990.

This is a broad-based, complex piece of legislation, covering a wide variety of issues related to promotion, distribution, public information, and research on tobacco products. It includes many issues within the jurisdiction of the Commerce Committee. For example, S. 1088 includes provisions relating to rotating health warning labels on tobacco products, and the preemption of State regulation of certain types of advertising and the promotion of tobacco products.

As chairman of the Consumer Subcommittee, I am particularly interested in the issues it addresses, involving consumer information about tobacco products, and I am pleased that the Commerce Committee has an opportunity to explore these issues. These issues are not without controversy. Both sides of these issues have strongly held views. We have worked hard on the hearing this morning to ensure that the witnesses we will hear from provide a balanced and fair statement of views on all sides of the issues presented.

In addition, as is this subcommittee's practice, the hearing record will remain open for 2 weeks from today for the submission of any additional written statements that any of the parties believe that the committee should consider. Let me just say in advance, that I appreciate the participation of all witnesses today. I will have to leave in about 20 minutes to preside over another hearing and I

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am going to turn the gavel over to Senator Ford. Let me, at this point now, yield to a Kentucky senior senator, Senator Ford, for any comments that he would like to make by way of an opening statement.

OPENING STATEMENT OF SENATOR FORD

Senator FORD. Thank you, Mr. Chairman. First, let me commend and thank you for holding this important hearing. I realize that we are coming into the home stretch of this session of Congress, and you have many pressing priorities as I do. Mr. Chairman, this bill would be devastating to the major industry of my State, tobacco, and, in my opinion, touches on some issues that fall exclusively within the jurisdiction of this committee. So, I think it is important that we hold this hearing today, and I appreciate your efforts and those of your staff in putting this hearing together.

This bill represents the ultimate wish list of the entire tobacco group. There is no doubt in my mind that this bill is an attempt to achieve by harassment what Americans will not approve directly, that is, prohibition of all tobacco products. As the elected voice of 95,000 farm families in Kentucky, most who depend upon the legal crop to pay their mortgages, send their children to college, and keep their farms running, I am not about to let that happen.

For the record, let me just briefly indicate the importance of the tobacco industry to the farm economy of my State. Tobacco is our largest cash crop. The net income from tobacco this year alone will exceed $900 million. The average tobacco quota for Kentucky farmers is 2 acres, and the yield per acre is in excess of $1,600 net. With an average net from farm income of approximately $12,000, tobacco provides over 25 percent or one-fourth of all farm income to my Kentucky farm families. And the impact in my home county, Davis County, Kentucky, is even greater.

In Davis County and the surrounding seven counties, the 2-month impact alone of tobacco is $30 million. The per acre farm value of tobacco is $3,500. This compares with a per acre farm value for wheat of $126, for hay of $166, for soybeans of $208, for grain corn $220. In Davis County and throughout Kentucky, tobacco is vitally important.

This bill, S. 1088, purportedly attempts to put the tobacco industry out of business, and that would have a devastating impact on Davis County and Kentucky as a whole. Now, I am serving notice that I will do all that I can to ensure that this does not happen. I am particularly concerned that some of the most onerous provisions of this bill fall within the jurisdiction of the Commerce Committee, and have not received a full airing.

I look forward to testimony today and believe that it will point out the very practical problems this legislation creates for a legal industry. I would hope, and I respectfully say to my distinguished chairman, that this hearing would not get too deeply into the major issues with the committee's jurisdiction, that of tort liability or preemption.

As my colleagues know, the subject of preemption and its effect on tort claims is a complex one which is being litigated before the Supreme Court right now. And I think we are all looking forward to what the Court will have to say about the state of that law. This

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committee authored the current preemption provision, and I think it would be inappropriate for the committee to publicly debate this issue while it is pending before the Court.

I am concerned that we here today not prejudice the Court either way on this issue. This committee will have ample opportunity to review and consider the Court's decision once it is available, and we will do so. But in the interest of fairness to both parties before the Court, I believe that lengthy discussion and debate of this issue is better off left to another day.

We certainly should take any and all written statements on the subject, but I would hope the witnesses would understand the reluctance of this Member and, perhaps, all of my colleagues, to entertain in-depth discussion of this issue today. In the interest of time, Mr. Chairman, I will end my comments at this point and submit a written statement for the record. And I also ask unanimous consent, Mr. Chairman, that a statement from Senator Terry Sanford expressing his serious concerns about the impact of this legislation on both the tobacco industry in his State and the economy of North Carolina in general, and that it be printed in the hearing record.

Senator BRYAN. Without objection, Senator Sanford's statement will be included and made a part of the record, and I thank you very much for your statement.

[The prepared statement of Senator Sanford follows:]

PREPARED STATEMENT OF SENATOR SANFORD

Mr. Chairman. I would like to thank you and my other distinguished colleagues on this committee for giving me the opportunity submit testimony to you today on S. 1088, the Tobacco Product and Health Protection Act of 1991.

I believe my testimony can be summed up very succinctly: I believe this bill would require spending a great deal of taxpayer money to educate the public about something which survey data indicates the public already knows and understands. That is simply a waste of money that could more appropriately be spent educating the public about things that are not already well known.

The bill is also unnecessary because the Federal Government and tobacco industry have already taken numerous steps to ensure that individuals, especially young persons, are properly informed about any potential dangers of tobacco use. The legislation before this committee is not only unnecessary and unwarranted but potentially very destructive to both the protection of First Amendment rights and the well-being our country's tobacco farmers and workers.

While I will not discuss all of the provisions of this legislation, I would like to comment on a few parts which I believe illustrate the faulty logic behind this bill.

First, S. 1088 calls for the distribution of $50 million next year alone for non-profit and public organizations to conduct public information campaigns against smoking. However, statistic after statistic shows that such education efforts are not necessary. I am told that one' recent study of children and adolescents found that over 98 percent were aware of the purported health risks of tobacco. Our country faces a $3 trillion deficit and our education systems struggle in the face of severe financial restraints. Certainly, the money authorized in this bill could be better spent teaching our children something they do not already so clearly understand.

The section of this bill to expand the warning labels on cigarette packages is also unneeded. Warning labels on cigarettes should ensure individuals can make an informed decision of whether or not to purchase a package of cigarettes. Again, evidence shows that consumers already possess this knowledge about tobacco usage. An increase in tobacco warning labeling serves not as needed information but as an attempt by anti-smoking advocates in Congress to press their beliefs onto consumers. The warning labels now contain a number of clear messages and these messages are rotated on a regular basis so that everyone regularly purchasing tobacco products is exposed to each one of the various warning labels. There is no evidence that I am aware of that indicates that this system is not working well.

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I am also concerned about Section 2758 of this legislation which would partially repeal the Federal preemption on State regulation of advertising of tobacco products. This language gives states and local governments the ability to establish their own rules to regulate cigarette billboard and transit advertising and would allow for obstructive advertising requirements as well as total advertising bans.

Our constitutional rights to free speech are too important to accept this. Congress can not simply prohibit truthful tobacco advertising because a majority of members of Congress do not like smoking. To accept this provision is to accept the concept that advertising of all types can become subject to suppression if the product becomes unpopular. This is a dangerous proposition which I believe undermines one of the founding and greatest principals of our country. Many in Congress may not like to hear certain messages but that is no reason to support a ban on them.

In addition, the changes set forth in S. 1088 are meddlesome and injurious to the workers and farmers whose livelihood depends on tobacco. I am proud to represent the tobacco farmers in North Carolina. They are decent, hardworking people who are simply trying to make a living through farming, the same way they have for decades. They have watched huge changes come about regarding public opinions on tobacco and smoking, and I can assure you that they are working diligently to adapt their farms and crops to reflect these new dynamics. They are going through enough and do not deserve to have the greater burdens added to them that this bill would impose.

The tobacco industry has already accepted heavy restrictions and burdensome regulations. The further changes this legislation would make will only penalize tobacco workers and farmers. We have taken great steps to help America's consumers, and there is no evidence that there is any confusion or lack of knowledge among them about smoking and tobacco. Now is the time to think about the workers and the farmers.

In conclusion, I would like to say that my objections to S. 1088 flow from my beliefs that the bill employs misguided assumptions over the need to educate the public on smoking and tobacco, a misuse of our financial resources during a time of budgetary crisis and mistaken placement of burden on the tobacco workers and farmers of this country who continually bear the brunt of the overzealous regulation of the tobacco industry. I urge my colleagues on the Commerce Committee to look very carefully at these concerns.

Senator BRYAN. We are pleased this morning to have with us Congressman Mike Synar, who ably represents the 2nd District of Oklahoma, an old and a personal friend, and let me extend to him a cordial welcome, and we welcome your testimony now, Congressman.

STATEMENT OF HON. MIKE SYNAR, U.S. REPRESENTATIVE FROM OKLAHOMA

Mr. SYNAR. Thank you, Richard. Thank you, Wendell, and thank the committee and all of you all for giving us this opportunity this morning.

Smoking and smoking-related illnesses will result in 434,000 Americans dying this year. Tobacco will cost this Nation $65 billion in health care costs and lost productivity this year. This represents a hidden tax to every single person in this country of $260. Now, even worse is the fact that this tragic loss of life and billions of dollars is 100 percent preventable. However, if you look at what we are doing here in Government—including Congress—we are virtually doing nothing. The legislation which Senator Kennedy has introduced is on the right track. I support it and I hope that it will get prompt consideration by the Senate.

I have been actively involved in this issue for over 6 years, and I came to it in a really unique way. A woman came to me from Ada, OK, whose son, Sean Marsee, was an outstanding athlete in that little small town in Oklahoma. Her son had been a smoker, but had been convinced, because of advertising from prominent

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sports figures, that smokeless tobacco was a safe alternative to cigarettes. Sean learned too late that was not the case, and he died from the use of that smokeless tobacco.

About 3,000 young people begin smoking each and every day of the year. Although the tobacco industry would insist otherwise, they are dependent on attracting new, young smokers. It is clear that new, young smokers must be recruited, and about 60 percent of all new smokers are under the age of 14 years old. Now, to sustain their sales, the tobacco companies must find replacements and they are looking to the most vulnerable in our society, our children.

Tobacco companies spend $2 billion a year on advertising and promotion. They use cartoon characters like Joe Camel and the Kool penguin. They play to the need of young people and men and women to fit in, to appear sophisticated, glamorous, and independent. From the Virginia Slims models to the Marlboro Man, the message is clear. To appear adult, you need to smoke. Last week, I participated in the Oklahoma Smoke-Free Program with Secretary of Health and Human Services Dr. Louis Sullivan. He summed up the situation in his speech the following way:

> It is immoral for civilized societies to condone the advertising and promotion of products which, when used as intended, cause disability and disease.

I think we have got to find a way to counter this deceptive message. I have introduced legislation on our side which would place restrictions on tobacco advertising and promotion activities which are aimed at converting young people as replacement smokers.

This approach is referred to as "tombstone advertising." This is currently the approach taken by the Securities and Exchange Commission toward advertising of securities, and very similar to the approached used by the FDA on pharmaceutical advertisements. The issue over tobacco advertising has really centered on the limits of the first amendment and the ability of Congress to regulate commercial speech.

I would draw the attention of the committee to the analyses of two very well-respected constitutional law scholars. One, Henry Miller and second, Alan Morrison. In their opinion, restrictions on tobacco advertisements do not violate the first amendment. In fact, the Supreme Court has held in several recent decisions that the Government can restrict commercial speech, when it has a compelling interest and there is a reasonable fit between the restriction and the reason for that restriction.

Let me close by saying that reasonable people may disagree, and clearly, from some of the statements already made, there is a disagreement on this. But an experience of last week has convinced me that the tobacco industry will oppose even the most reasonable and modest of approaches that Congress chooses to take. Last week, in the Subcommittee on Health and Environment, we marked up legislation to reauthorize the Federal drug abuse treatment programs.

Included in that legislation were several provisions which required that the drug education classes also instruct teens in the dangers of cigarette smoking. The rationale for linking drug abuse education programs with adolescent tobacco use is grounded on the results of several reputable studies. It has been shown that teens who smoke are 32 to 100 times more likely to use illicit drugs. The

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legislation also required States to adopt a minimum age of 18 for tobacco use and to enforce those laws. The tobacco industry fought each and every one of those provisions.

I cannot stress how important it is for our Nation and our ailing health system, and for unsuspecting teens that Congress take action and take action now. Thank you, Mr. Chairman.

[The prepared statement of Mr. Synar follows:]

PREPARED STATEMENT OF CONGRESSMAN SYNAR

Mr. Chairman and Members of the Consumer Subcommittee thank you for permitting to testify before you today regarding one of the most serious health problem facing our country today—tobacco use.

Smoking and smoking-related illnesses result in 434,000 deaths each year. Tobacco use costs our country $65 billion in health care costs and lost productivity each year. This represents a hidden tax of approximately $260 per year on each American citizen.

Even worse, this tragic loss of life and the billions of dollars in costs are 100- preventable. Rather than taking steps to reduce smoking in our country, however, the government—including Congress—is doing virtually nothing. As we continue the debate over how to cure our sick health care system, the Congress must squarely address the costs of tobacco use in our country and do something to prevent people, especially young people, from smoking in the first place. The legislation introduced by Senator Kennedy is on the right track. I support the Kennedy legislation and urge its prompt consideration in the Senate.

I have been actively involved in the debate over adolescent tobacco use for 6 years now. This issue first caught my attention when I heard about the tragic story of a young man in Oklahoma who died of oral cancer caused by the use of chewing tobacco. This poor young man believed the tobacco industry's claims, made through prominent sports figures, that smokeless tobacco was a safe alternative to cigarettes. That led me to introduce legislation banning radio and television advertisements for smokeless tobacco products, requiring manufacturers to warn users of the product of the serious health risks, and requiring all promotional items include warning labels. That bill became law in 1986.

During my work with this issue, I learned that smokeless tobacco use by adolescents was just the tip of the iceberg. About 3,000 young people begin smoking each and every day. Although they insist otherwise, the tobacco industry is dependent upon attracting young smokers: given the facts that nearly one-half of all living adults who ever smoked have quit—and that nearly a half-million smokers die year—it is clear that new smokers must be recruited. About 60 percent of all new smokers are under 14 years old.

Why are so many young people smoking? Because the message they get from the tobacco industry tells them smoking isn't a problem. To sustain their level of sales, tobacco companies must find replacements. They are looking to our children. Tobacco companies spend $2 billion on advertising and promotional activities each year. They use cartoon characters like "Joe Camel" and the "KOOL" penguin. They play to the need of young men and women to fit in, to appear sophisticated, glamorous and independent. From the "Virginia Slims" models to the "Marlboro Man", the message is clear—to appear adult, you need to smoke.

Their efforts appear to be working. Children's use of camel cigarettes - traditionally an adult brand - increased from 2 percent in 1979 to 8 percent in 1989. I participated in an Oklahoma Smoke-Free program with Secretary of Health and Human Services Dr. Louis Sullivan recently. He summed up the situation by saying "It is immoral for civilized societies to condone the advertising and promotion of products which, when used as intended, cause disability and disease."

We must find a way to counter this deceptive message. I have introduced legislation which would place restrictions on tobacco advertising and promotional activities which are aimed at converting young people into replacement smokers. Although the approach I have advocated is not formally before your subcommittee today, I anticipate that later panels will refer to it and therefore, want to mention it. This approach is referred to as "tombstone" advertising because it would prohibit the use of pictures, colors and suggestive images in advertisements. This is currently the approach taken by the Securities and Exchange Commission toward the advertising of securities and very similar to the approach utilized by the FDA in pharmaceutical advertisements. The justification for these restrictions is the potential for investors and consumers to be deceived about the soundness of a particular investment or the

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benefits of a particular drug. Just as the risk of monetary loss to a prospective investor, or health consequences from use of a drug, warrants restrictions on advertising, so too does potential loss of life warrant restrictions on tobacco advertising.

The issue over tobacco advertising has centered on the limits of the First Amendment and the ability of Congress to regulate commercial speech. I know I don't need to give you Senators a lesson in Constitutional law. I would, however, like to draw your attention to analyses of two well-respected Constitutional law scholars: Henry Miller and Alan Morrison. In their opinions, restrictions on tobacco advertising do not violate the First Amendment. The Supreme Court has held in several recent decisions that the government can restrict commercial speech when it has a compelling interest and there is a reasonable fit between the restriction and the reason for the restriction. See, *Central Gas and Hudson Electric Company, Posadas,* and *Fox* cases.

Reasonable people may disagree about the protection our Constitution affords commercial speech. The Senate may ultimately decide that a more modest approach is warranted. Until very recently I was inclined to think that way as well. After all compromise is the hallmark of legislation. An experience I had recently, however, has convinced me that the tobacco industry will oppose even the most reasonable and modest of approaches the Congress chooses to take. Let me explain. Last week the House Subcommittee on Health and Environment marked up legislation to reauthorize federal drug abuse treatment program. Included in that legislation were several provisions which required that drug-education classes also instruct teens of the dangers of cigarette smoking. The rational for linking drug abuse education programs with adolescent tobacco use is grounded on the results of several reputable studies. It has been shown that teens who smoke are 32 to 100 times more likely to use illicit drugs. The legislation also required states to adopt a minimum age of 18 for tobacco use and to enforce those laws. The tobacco industry fought each and every one of these provisions.

In conclusion, I want to commend you for holding these hearings today. I cannot stress enough how important it is to our nation, to our ailing health care system and to unsuspecting teens that Congress take action to reduce the prevalence of smoking in our country.

Senator BRYAN. Thank you very much, Congressman Synar. And does the subcommittee have any questions of the Congressman? Senator Ford.

Senator FORD. I might make just one statement. I am sure you want to be correct in your statement. The tobacco industry supports the 18-year-old level. They support that provision in the committee, and you state that they fought it. We have no problem with an 18-year limit, and I think the tobacco industry has made that very, very clear, that they support the 18-year-old limit. I just wanted to make that point.

Mr. SYNAR. I might just add, and you are correct, they have added the 18 limit. But as you know, Senator Ford, a law that is not enforced is practically not a law at all.

Senator FORD. That is not our fault. You pass a lot of laws. You do not know whether it is enforced or not. You cannot criticize your local community for not carrying out laws.

Senator BRYAN. Are there other questions for Congressman Synar?

None appearing. Thank you very much for your testimony this morning, we appreciate it. We will now convene our first panel, which will consist of the Hon. Charles O. Whitley, senior consultant from the Tobacco Institute; Ms. Brenda Richards, principal, I believe it is probably pronounced Shaed Elementary School, but I will give Ms. Richards a chance to correct me if I have mispronounced her school; Dr. Lloyd D. Johnston, program director and research scientist, Institute for Social Research at the University of Michigan; and Mr. David Bell, president of Basel, Inc., on behalf of the Freedom to Advertise Coalition of the American Ad-

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vertising Federation, of the American Association of Advertising Agencies.

Before calling upon the first of our panelists to offer any testimony, let me yield now to Senator Gorton for any opening statement he would care to make.

OPENING STATEMENT OF SENATOR GORTON

Senator GORTON. Thank you, Mr. Chairman. This is an important issue, and at least some aspects of S. 1088 are well within the jurisdiction of this subcommittee.

We have, in Congress, over the last 20 years or so, through the publicity which Congress has given through warning labels, through the banning of advertising on radio and television, contributed to a significant reduction in smoking in the United States.

The various aspects of the bills which are before us raise questions of effectiveness, they raise questions relating to the Constitution, they raise questions relating to the appropriate use of the powers which we have. To continue to discourage smoking in a free society, and, most particularly, to add to the education of our young people, so that fewer and fewer of them take up smoking, as most of people who begin it, begin it in school, is a very, very important goal. I think we need to listen very carefully to all sides of this debate, and to recognize that we have had some very real successes in the past, and hope that we can have successes in the future.

Senator BRYAN. Thank you very much, Senator Gorton. Let me yield to Senator Kasten for any opening comments he would care to make.

OPENING STATEMENT OF SENATOR KASTEN

Senator KASTEN. Mr. Chairman, I do not have a formal opening statement. I just wanted to make the point that, if we are going to legislate something, we should assume that whatever we are doing is not redundant, and that it is not going to be overly costly in terms of risk and rewards.

The testimony today, I think, is very important. I am not going to be able to be here for the whole hearing, but I have had a chance to review some of this testimony already. The real question I have is that a lot of this action is action that, in effect, is already being taken. As far as I can see, from the information, most Americans already are, in fact, aware of the risks of smoking. However, they are making a choice to smoke. Whether or not this legislation is going to simply increase costs or increase regulation to do something that, in effect, is already going on, is the question I think I have, and I know a number of others have, and that is why I think this hearing today is going to be important.

If we are simply doing something that is redundant or repetitive, that is one thing. If we are doing something that, in fact, is going to have an additional benefit for a cost that is a very different thing.

As I have reviewed parts of this testimony already, I think that is at least one of the important issues that we have to deal with here today. I look forward to working with you, Mr. Chairman, and I thank you for having this hearing.

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Senator BRYAN. Thank you very much, Senator Kasten. Because we do have a full panel, the first panel and the second panel as well, I am going to ask each of you to confine your statements to 5 minutes. Your full testimony, as Senator Kasten has observed, has already been received by the subcommittee, and has been made part of the record.

Now let me invite our first witness, Mr. Whitley. We would be pleased to hear from you, sir.

STATEMENT OF CHARLES O. WHITLEY, SENIOR CONSULTANT, THE TOBACCO INSTITUTE, WASHINGTON, DC

Mr. WHITLEY. Thank you, Mr. Chairman. And, before I get on the clock, if I may, I would like to ensure that you receive in full for the record written statements from Mr. John Joyce, the president of the Maine Grocers Association; Mr. Dewey Stokes, the president of the Fraternal Order of Police; Dr. Theodore Blau, a practicing psychologist from the State of Florida, on the subject of addiction; Mr. Ronald Rotunda, who is a professor of law at the University of Illinois, on the Canadian decision; Dr. Richard Mazerski, professor of marketing at Florida State University, on the labeling aspects of the bill; and statements by Mr. Frank Balistreri, Chief of Police, Waunakee, WI; Mr. Ray Vega, Vega Wholesale in Nevada; Mr. Wes Ball, president of the Tennessee Grocers Association.

Senator FORD [presiding]. Without objection, all those statements are being put in the record, Mr. Whitley. You may proceed, and the lights will go on.

Mr. WHITLEY. We appreciate your holding this hearing, and giving us an opportunity to testify on S. 1088. This bill would spend $110 million a year of scarce funds to, as Senator Kennedy has put it, get the antismoking message to the Nation.

It is not clear which Federal programs would be abolished or reduced to provide these funds, but what is abundantly clear is that the antismoking message has already been delivered to the Nation.

Dr. Gerald Goldhaar, who had testified before a House subcommittee in the last Congress, said, the level of public awareness on smoking and health issues is virtually unprecedented in our national experience.

One survey showed that not only had they heard of health risks supposedly associated with smoking, but more than 90 percent of Americans actually believed that smoking causes lung cancer and heart disease.

Young people, especially, are aware of the risks attributed to smoking. As the Surgeon General has stated, by the time they reach the seventh grade, the vast majority of children believe smoking is dangerous to one's health. And, of 895 children in adolescence questions in one recent survey, over 98 percent said they believe smoking is harmful and accurately named one or more body parts that are adversely affected by smoking.

Young people start to smoke not because they are unaware of the claimed health risks of smoking, or because of cigarette advertising. As has been demonstrated repeatedly, the dominant influences on smoking by young people are family and peers. When the antitobacco lobby complains that the Government spends too little

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on disseminating the antismoking message, it conveniently overlooks the value of free media. That antismoking message is received daily, as the Advocacy Institute has acknowledged. By standards which apply to most running stories, coverage of smoking has enjoyed an extraordinary run in the media.

The antismoking message, moreover, is taught to our Nation's children at every level in school. A 1988 survey of public school districts, by the National School Board Association, found that 75 percent had antismoking programs at the elementary level, 81 at the middle school level, and 78 at the high school level.

It is highly significant that, testifying on this bill's predecessor last year, Secretary Sullivan said this: "We do not believe that the additional authorization and requirements contained in this bill would measurably add to our current or planned efforts. Therefore, we believe such legislation is unnecessary."

The Secretary proved his point last month, when he dramatically launched a 7-year, $165 million antismoking Federal program called Operation Assist that mirrors S. 1088 and implements its principal objectives.

We do not agree with some of the provisions of Operation Assist as outlined by the Secretary, but, again, it demonstrates that he already has ample authority to do what this bill seeks to do. There is a tremendous amount of Government activity at the Federal level, the State, and local level, by many private institutions, and by our own industry.

Mr. Chairman, I would like to take the remainder of my time to call your attention to an industrywide program that we at the Institute launched in December of last year, to address major new initiatives to curb youth smoking. They include a national It's The Law program. I call your attention to the board over there.

Under this program, we have distributed millions of materials; stickers to be placed on cash registers, counters, on uniforms of sales clerks. We are working cooperatively with State associations of retailers to see that this is done throughout the country.

In addition to that, we have supported, and continue to support, State laws requiring that young people be 18 years of age in order to buy cigarettes. We did that last year in a number of States, which included Louisiana, Wyoming, North Carolina, Vermont, Virginia, and the District of Columbia. We did not do it in your State, Senator, and some others, because their legislatures were not in session.

State Senator Kennedy in Virginia held a news conference in Richmond, and we participated in that, in support of that bill. The legislator who introduced the bill in North Carolina stated in a press statement that had it not been for the support of the Institute, her bill would not have passed.

So, we are supporting that at State level, and then we are working cooperatively with retailers and retailers' associations in every State to enforce that law through information and materials provided to all their dealers, to see that the law is carried out.

In addition to that, we have supported laws that limit vending machines to places that are not frequented by young people, and which have adult supervision. We continue to press for that, but

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we do not support unjustifiably restrictive measures that would prohibit vending machine sales to adults.

We have greatly restricted sampling. We are not doing any sampling now on public streets, sidewalks, parks, or any places that are not off-limits to minors. There is no sampling through the mail without a signed certificate that the addressee is a 21 years or older smoker and wishes to receive a sample.

In addition to that, probably the most important aspect of our new program is our educational program, and with me here today is Ms. Brenda Richards, a member of the consortium that we work with, who will address that.

I will not dwell now on the antiadvertising provisions, changes in the labeling act, ingredient reporting, and other provisions of the bill that are addressed in detail in my written statement, but I will be happy to answer questions concerning them.

I see my time is up. Thank you, Mr. Chairman.

[The prepared statements of Mr. Whitley, Mr. Joyce, Mr. Stokes, Dr. Blau, Mr. Rotunda, Dr. Mizerski, Mr. Balistreri, Mr. Vega, and Mr. Ball follow:]

PREPARED STATEMENT OF CHARLES O. WHITLEY

Mr. Chairman and distinguished members of the Subcommittee, we appreciate this opportunity to testify on S. 1088, the "Tobacco Product Education and Health Protection Act of 1991."

S. 1088 is essentially the legislation reported last year as S. 2795 by the Labor and Human Resources Committee with some new provisions added. Some of the new provisions were included in S. 2795 as introduced but were removed by the Labor Committee at markup. The warning label provisions of S. 1088 appear to have been inspired by a bill introduced last year by Representative Waxman (H.R. 5041).

Mr. Chairman, S. 1088 mandates extravagant and expensive new efforts to tell people what they already have been told and believe to be true—"to get the antismoking message to the Nation," as Senator Kennedy has put it.[1] To carry out these and the other mandates of the bill would cost the Federal government $110 million a year. It is not clear which Federal program or programs would be sacrificed or trimmed in favor of those mandated by this bill.

Testifying on S. 1088's predecessor before the Labor Committee last year, Secretary of Health and Human Services Louis W. Sullivan said:

> "We do not believe * * * that the additional authorizations and requirements contained in [the bill] would measurably add to our current or planned efforts. Therefore, we believe such legislation is unnecessary."

The Secretary dramatically confirmed this statement last month when he launched a seven-year, $165 million anti-smoking federal program known as "ASSIST" that mirrors S. 1088 and implements its principal objectives. Additionally, the Administration's FY 1992 Budget nearly doubles (to $6.8 million) the budget for the Office on Smoking and Health in HHS—in part to fund "public information and education campaigns designed to encourage smokers to quit and to discourage the uptake of smoking, especially among adolescents."

Under the new ASSIST program, the Secretary has awarded seven-year contracts to 17 states "to develop and implement effective, comprehensive methods and programs to stop and prevent tobacco use."[2] State health departments will use the funds to "focus on increasing public education about tobacco and health issues and adopting private and public policies that will reinforce nonsmoking throughout the country."[3] Antismoking activities authorized by the ASSIST program will be carried out "through the mass media, worksites, schools, health-care facilities and commu-

[1] 137 Cong. Rec. S6,037 (daily ed. May 16, 1991).

[2] Remarks by Louis W. Sullivan, M.D., Secretary of Health and Human Services, ASSIST Program Kickoff News Conference, Oct. 4, 1991, page 2.

[3] HHS News Release, October 4, 1991, page 2.

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nity organizations."[4] Like the programs authorized by S. 1088, the ASSIST program "will identity high-risk smoking population groups in each state and determine the best approaches for reaching these targeted groups."[5]

Mr. Chairman, while we do not endorse the ASSIST program, the program demonstrates that new legislation is not needed to carry out the principal goals of S. 1088.

INDUSTRY INITIATIVES

S. 1088 is particularly ironic in light of the aggressive efforts undertaken by our industry to keep tobacco products out of the hands of young people and to discourage youth smoking.

Mr. Chairman, members of the subcommittee, and everyone present, I am here to tell you that the tobacco industry opposes youth smoking. We do not want underage youths buying or using our products. Smoking is an adult decision. We have a long history of efforts to discourage young people from smoking. Last year we expanded our efforts considerably.

In December 1990, our industry announced a series of major new initiatives to curb youth smoking and address related concerns about cigarette advertising and promotion. Those initiatives include—

- A national "It's the Law" program to help retailers observe and enforce state laws prohibiting tobacco sales to youth.
- Industry support for new state laws setting a minimum age of 18 for cigarette sales in those states with no minimum age law or one lower than 18.
- Industry support for new state laws requiring supervision of cigarette vending machines located in places frequented by minors.
- Sharp new limitations on the distribution of product samples and premiums, requirements that billboard advertisements for cigarettes be located away from areas near schools and playgrounds, and other strong new industry guidelines.
- Assistance to parents to help their children resist peer pressure to smoke with a new educational publication, "Tobacco: Helping Youth Say No," promoted through a multiyear advertising campaign.

I would like to call your attention to the poster displays that show just how closely our voluntary initiatives track the programs contemplated by S. 1088. Reduced copies of these displays appear on the pages that follow.

Let me report briefly on the gratifying results to date.

Sales

Our "It's the Law" program is underway in every state having 18 or 19 as the minimum sales age. We already have distributed over one million program materials to thousands of retailers throughout the country, to help them observe their state laws regarding the sale of cigarettes. Over 100 cosponsoring retail organizations have joined with The Tobacco Institute to distribute these materials.

In addition, this year we supported the enactment of laws establishing a minimum sales age of 18 in Louisiana, Wyoming, North Carolina, Vermont, Virginia and the District of Columbia. We hope to see successful passage of similar laws in Delaware, Georgia, Kentucky, Missouri, Montana and New Mexico.

Vending

Laws were enacted this year in nine states to limit minors' access to cigarette vending machines. Some of these laws require supervision in places frequented by minors, as we have proposed, and some are even more restrictive—in some cases, more restrictive than we believe is reasonable or fair. We will continue to press for supervision legislation, while opposing unjustifiably restrictive measures.

Sampling

In December 1990, the cigarette manufacturers voluntarily adopted sharp new limitations on product sampling. No cigarette sampling will be conducted in or on public streets, sidewalks, or parks, except in places off limits to minors. There is to be no sampling through the mail without a signed certification that the addressee is 21 or older, a smoker, and wishes to receive a product sample. It has long been the industry's policy not to distribute samples to any person under 21 or to anyone, regardless of age, near schools or other centers of youth activity.

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[4] Ibid.
[5] Ibid.

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Education

Research shows that peer pressure is one of the primary reasons that young people begin to smoke. In order to help young people resist negative peer pressure, The Tobacco Institute asked for the help of respected educators from around the country in preparing a booklet for parents. The result is "Tobacco: Helping Youth Say No," the third in a series of publications addressing peer pressure that have been made available by The Tobacco Institute.

The booklet offers practical advice and actual techniques that parents, educators and other concerned adults can use in talking to young people about smoking. "Tobacco: Helping Youth Say No" is being promoted by The Family COURSE Consortium, a group of educational experts and representatives of organizations who have joined together to promote family values and the importance of communication in helping young people develop into responsible adults.

Over 175,000 copies of "Tobacco: Helping Youth Say No" have been distributed to parents, school counselors, teachers, administrators and civic and youth group leaders over the past ten months. You may have seen advertisements offering the booklet in major national magazines such as Parade, People, McCalls, Better Homes & Gardens, and Ebony. It is available free of charge by writing or calling an 800 number.

SUMMARY—WHY S. 1088 SHOULD BE REJECTED

Let me summarize our principal objections to S. 1088, before proceeding to a more detailed analysis of the bill.

Public Information Campaigns.—S. 1088 would distribute $50 million a year to anti-smoking groups for anti-tobacco advertising campaigns—even though Americans already are nearly universally aware of the claimed risks of smoking. A multi-million dollar media campaign in California that began in April 1990 has not had any significant impact on smoking but it has raised troublesome questions about the line between legitimate public education and government propaganda.

Model State Program.—S. 1088 would distribute $25 million a year to help 10-20 states enforce their own laws prohibiting the sale or distribution of tobacco products to minors. Using these federal grants, the bill would make those "model" states the instruments of a centrally planned and directed federal anti-smoking program—bypassing the states' own political decision-making processes and usurping state legislative functions. The bill would make it a federal crime to violate state laws prohibiting the sale of tobacco products to minors.

School and Workplace Programs.—S. 1088 would provide $10 million a year for anti-smoking programs in schools and workplaces even though state and local governments already are pursuing such programs aggressively on their own. The federal ASSIST program launched earlier this month by Secretary Sullivan also would specifically target worksites and schools for anti-smoking education efforts.

Additives and Constituents.—S. 1088 would direct the Secretary of Health and Human Services to regulate tobacco additives (i.e., ingredients)—even though the safety of ingredients already is the responsibility of the Secretary under existing law and the Secretary himself has stated that tobacco product ingredients are a "peripheral" concern.[6] The bill also would require disclosure of tobacco additive information on product packages or in package inserts even though such disclosure is unlikely to affect a smoker's choice of brands or the basic decision to smoke. Further, the bill would transfer to the Secretary supervisory responsibilities with respect to "tar," nicotine and carbon monoxide now being performed satisfactorily by the Federal Trade Commission.

Addiction Warning.—S. 1088 would require an "addiction" warning on cigarette packages and in cigarette advertising—even though almost one of every two smokers has quit, most of them without professional assistance, and even though calling smoking an "addiction" trivializes our nation's serious drug problem.

Label Format.—S. 1088 would move the warning label that appears on cigarette packages from the side to the front and back panels, and would require the label to occupy at least 20 percent of the front and back panels, even though Americans already are nearly universally aware of the claimed risks of smoking. The bill, moreover, would give the Secretary authority to promulgate regulations implementing the new warning label requirements. Sec. 2743. Granted such authority, it is prob-

[6] Tobacco Education and Control Act: Hearings on S. 1883 before the Senate Comm. on Labor and Human Resources. 101st Cong., 2d Sess. 35 (1990).

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able that the Secretary would be urged to require "scare" formats such as those set forth in last year's Waxman bill (H.R. 5041).[7]

Advertising.—Setting forth unsupported "findings" concerning the impact of tobacco product advertising, S. 1088 would allow each state and local government to establish its own rules and regulations regarding cigarette billboard and transit advertising within its borders—thereby inviting censorship in violation of the First Amendment and abandoning to that extent Congress's consistent 25-year policy of nationally uniform regulation of cigarette advertising. Congress should heed the decision of the Quebec Superior Court this past July striking down Canada's tobacco product advertising ban. That Court found no persuasive evidence that banning tobacco product advertising would reduce consumption and invalidated the ad ban as an unacceptable exercise in paternalism.

Tort Claims.—S. 1088 would allow state tort claims denying the adequacy of the health warnings mandated by Congress to be asserted against cigarette manufacturers in product liability lawsuits—allowing individual judges and juries in the 50 states and the District of Columbia to substitute their judgment for that of Congress and Balkanizing the regulation of the labeling and advertising of a nationally marketed product.

I will discuss these points in detail.

PUBLIC INFORMATION CAMPAIGNS

Sec. 3(a) of S. 1088 would add a new Title XVIII to the Public Health Services Act, "Tobacco Health and Education Programs." Sec. 2701 of the new title would direct the Secretary of Health and Human Services to establish a Center on Tobacco and Health within the Centers for Disease Control. The Labor Committee has stated that the Center should be created out of the existing Office on Smoking and Health. S. Rep. No. 112, 102d Cong., 1st Sess. 33 (1991). The bill would authorize the Center at a level of $25 million for the first year—seven times the Office's FY 1991 budget of $3.5 million.

The Center would be authorized to distribute an additional $50 million in grants to public or private entities to conduct anti-smoking media campaigns. Secs. 2702(2), 2711. The Center also would be responsible for providing information to film makers, broadcast media managers, and others "regarding the role of the media in promoting tobacco use behavior." Sec. 2702(3).

Mr. Chairman, these provisions of S. 1088 appear to be based on the mistaken premise that Americans are unaware of the claimed health risks of smoking. In fact, as one authority noted last year in testimony before the House Subcommittee on Health and the Environment, "the level of public awareness on smoking and health issues is virtually unprecedented in our national experience."[8] More Americans are aware of the allegations with respect to smoking and health than can identity George Washington or know when our Nation declared its independence. Nearly every American believes smoking is haul but only 1 of 3 Americans knows who delivered the Sermon on the Mount.[9]

Young people, especially, are aware of the risks attributed to smoking. As the Surgeon General has stated, "[b]y the time they reach seventh grade, the vast majority of children believe smoking is dangerous to one's health."[10] Of 895 children and adolescents questioned in one recent survey, over 98 percent said they believed smoking is harmful and "accurately named one or more body parts that are adversely affected by smoking."[11] Young people start to smoke not because they are unaware of the claimed health risks of smoking or because of cigarette advertising.

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[7] The Labor Committee has stated explicitly that regulations implementing S. 1088's warning label requirements could be "written and enforced" by the Department of Health and Human Services rather than the Federal Trade Commission. S. Rep. No. 112, 102d Cong., 1st Sess. 51 (1991). The Secretary also would be given general authority to review the "effectiveness" of the warning labels and to study how to improve the "effectiveness" of such labels. Sec. 2702(6). S. 1088 would authorize the Secretary to require that "tar," nicotine, carbon monoxide and additive information be provided on the front and back panels. Sec. 2751(c)(1).

[8] See Tobacco Control and Marketing: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce 101st Cong., 2d Sess. 583 (1990) (statement of Gerald M. Goldhaber, Chairman, Department of Communication, State University of New York (Buffalo)).

[9] Ibid.

[10] "Smoking and Health: A Report of the Surgeon General," p. 17–10 (1979).

[11] Leventhal, et al., "Is the Smoking Decision an 'Informed Choice?'" JAMA, vol. 257, pp. 3373–76 (1987).

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As has been demonstrated repeatedly, the dominant influences on smoking by young people are family and peers.[12]

When the anti-tobacco lobby complains that government spends "too little" on disseminating anti-smoking messages, it conveniently overlooks the value of the free media that such messages receive daily. As the Advocacy Institute has acknowledged: "By standards which apply to most running stories, coverage of smoking has enjoyed an extraordinary run in the media."[13] Anti-smoking messages, moreover, are taught to our nation's children at every level in school. A 1989 survey by the National School Boards Association found district-wide anti-smoking programs in 78 percent of the high schools, 81 percent of the middle and junior high schools, and 75 percent of the elementary schools. According to NSBA, this represents a "significant increase" since 1986.[14]

It would seem profligate, in the face of the federal budget deficit, for Congress to authorize an additional $50 million per year to promote messages that Americans young and old alike already understand and believe and that are reinforced continually and pervasively by the news media and by the states through the school system.

The Labor Committee referred in its report on S. 1088 to California's highly publicized anti-smoking media campaign. S. Rep. No. 112, supra at 35. As Jacob Sullum of Reason magazine has observed, however, the California program lends no support to the premise that such campaigns actually reduce smoking.[15] According to cigarette sales figures from the State Board of Equalization, between April 1990, when the California advertising campaign was launched, and the end of the year, Californians bought only about one percent fewer packs of cigarettes than during the same period in 1989. In 1990 as a whole, they actually bought about one percent more cigarettes than in 1989. The figures do show a 14 percent drop in sales in 1989—the year before the anti-smoking advertising campaign was launched. That was the year the cigarette sales tax was increased by 250 percent—from 10 cents to 35 cents a pack.

We are concerned, moreover, that S. 1088's provision for anti-smoking media campaigns might be construed to authorize "attack" ads of the kind run by California's health department—advertisements that do not tell people about smoking and health but simply vilify the cigarette manufacturers. The obvious aim of these ads was to make viewers recoil not so much from cigarettes as from those who make them and to disbelieve anything the cigarette manufacturers may say. Professor William Van Alstyne of the Duke University School of Law has characterized such ads as domestic propaganda" that raise "serious First Amendment questions."[16] As he has stated:

> "Philosophically, the First Amendment * * * was meant to establish a firm barrier against government's having any systematic power to involve its power to levy taxes for the purpose of establishing or maintaining any domestic propaganda services meant to dominate or direct the marketplace of ideas in the United States. * * *

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[12] See e.g., Smoking Prevention Act: Hearings on H.R. 1824 before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce. 98th Cong., 1st Sess. 53 (1983) (statement of Mortimer B. Lipsett, M.D., Director, National Institute of Child Health and Human Development) ("The most forceful determinants of smoking [by young people] are parents, peers, and older siblings."); Aaro, Wold, Kannas & Rimpella, "Health Behaviour in Schoolchildren: A WHO Cross National Survey," Health Promotion vol. I, no. 1, pp. 17, 21 (May 1986) ("When young people start smoking, the most important predictor is the smoking behaviour and smoking-related activities of 'significant others.'"); Isohanni, Moilanen & Rantakalio, "Determinants of Teenage Smoking, with Special Reference to Non-Standard Family Background," Brit. J. Addict. (86) 391–398 (1991).

[13] "Media Strategies for Smoking Control—Guidelines," p. 9 (Jan. 14–15, 1988).

[14] National School Boards Ass'n, "Smoke Free Schools—A Progress Report," pp. 7–8 (1989). The Labor Committee claimed in its report on S. 1088 that 34 percent of high school seniors do not believe that smoking a pack of cigarettes a day presents a great risk of harm. S. Rep. No. 112, supra at 8. The source of this statistic is a NIDA survey in which high school seniors were asked to rate the "harmfulness" of cigarettes along with alcohol and hard drugs. Far from showing that many high school seniors do not believe that smoking is harmful, the survey shows that more than two-thirds placed smoking in the same "great risk" category as regular use of marijuana, LSD, cocaine, crack and heroin. See National Institute on Drug Abuse, "Drug Use, Drinking, and Smoking: National Survey Results from High School, College and Young Adult Populations 1975–1988," p. 129 (1989). The fact that one-third did not place smoking in the same category with such substances hardly suggests that these young people fail to appreciate the seriousness of the asserted dangers of smoking.

[15] Sullum, "Smoke and Mirrors on the Anti-Smoking Front," Wall St. J., Aug. 5, 1991, at A14, col. 3.

[16] Van Alstyne, "A New Free Speech Problem: Government Propaganda Against Business," July 6, 1990, p. 1 (Washington Legal Foundation Legal Backgrounder).

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"Any proposed expenditures for financing from federal taxes and directing large scale, systematic information campaigns at every level of government openly directed to shape public attitudes and mobilize popular demand for more restrictions on any group or enterprise should give persons concerned with the First Amendment great difficulty."[17]

We also view with concern the provision of S. 1088 directing the Center to provide film makers, broadcast media managers and others with "information * * * regarding the role of the media in promoting tobacco use." Sec. 2701(3). It is not difficult to guess what the Center would advise the media its "role" should be so far as tobacco is concerned. It is not appropriate for government to suggest to artists, writers and others in the media how to portray smoking or smokers in their work, or to suggest that some portrayals are more politically "correct" than others. It is one thing for government officials to speak out on an issue but quite another for the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[18] As set forth in the industry Cigarette Advertising and Promotion Code, the cigarette manufacturers do not pay movie makers to use their products, or advertisements for their products.

MODEL STATE PROGRAMS

The Center would be directed to "provide assistance to States to enhance their efforts to enforce existing State laws concerning the sale of tobacco products to minors within the State." Sec. 2701(3). Secs. 2715–2718 would direct the Center to make grants to States to improve State efforts to prevent initial tobacco use by minors and encourage the cessation of tobacco use, especially by members of "high-risk" groups. Sec. 2715(a). The grants would be made available to States that enact and enforce laws prohibiting tobacco sales to minors, prohibiting tobacco product sampling, and prohibiting cigarette vending machines except at locations where minors are not allowed. Sec. 2715(b).

Mr. Chairman, no one can seriously suggest that state and local governments need additional federal encouragement in this area. Virtually every state prohibits the sale or distribution of tobacco products to minors and many state and local governments currently are considering a variety of measures to strengthen existing laws in this regard. When state and local authorities commit themselves to vigorous enforcement of these laws, the results can be dramatic indeed. The Inspector General of the Department of Health and Human Services reported last year that in a single state (Utah) authorities issued nearly 4,500 violations to minors for purchasing and/or possessing tobacco products in 1989.[19] As discussed above, the industry is supporting the enactment of state laws prohibiting the sale of tobacco products to persons under 18 and the industry is encouraging retailers to observe these laws through our "It's the Law" program.

The model state program called for by S. 1088 is not simply unnecessary. As John Joyce, Executive Director of the Maine Grocers Association, stated last year in a letter to Senator Kennedy in connection with S. 1088's predecessor, the program would constitute "an improper interference with state political processes and would set a dangerous precedent."[20] S. 1088 ostensibly offers federal assistance to states in pursuing their own anti-smoking programs, but a close reading of the bill's "assistance" provisions suggests that the Center would strongly influence the content and structure and guide the execution of these state programs—bypassing the state's own political decision-making processes. See S. Rep. No. 112, supra at 37–38, 40–41. Effectively, the several state departments of health would be made the instruments of a centrally planned and directed federal anti-smoking program.

To obtain a grant, a state would have to designate a "lead agency" to work in conjunction with the Center. Sec. 2716(1). This State agency, as described in the bill, almost certainly would have to be the Department of Health, even though the state agency's responsibilities under the program would relate primarily to law enforcement. The state agency would be expected to call on a new federal Office of Regulatory Affairs established by the bill to help it enforce its laws. Sec. 2716(2)(E). The bill would establish mechanisms and procedures that the state would have to follow in implementing its own laws. Sec. 2716(2). The sale of tobacco products to minors in a model state would be made a violation of federal law. Sec. 2741(a)(9). Federal remedies—including civil actions by private parties—would be provided against retailers for illegal sales to minors. Sec. 2742 (b), (c), (e).

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[17] Id. at 2.

[18] *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943).

[19] Office of the Inspector General, "Youth Access to Cigarettes," p. 3 (May 1990).

[20] Letter of John J. Joyce, Executive Director, Maine Grocers Association, to Hon. Edward M. Kennedy, May 9, 1990, p. 3.

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Presumably none of this would require any approval by a model state's legislature. Indeed, it is obvious that the entire model state program is an attempt to bypass the state legislative process—federal anti-smoking legislation to be executed by state health officials without consideration or approval by the state's own lawmakers. As Mr. Joyce has stated, Congress "should not usurp [the] state legislative function by empowering the state executive branch agencies to impose penalties or remedies that the legislature of the state did not see fit to create."[21]

SCHOOL AND WORKPLACE PROGRAMS

Secs. 2721 would direct the Center to make grants to public and private entities for "activities that will prevent the initiation, and encourage the cessation, of the use of tobacco products among workers and their families," especially "groups with the highest prevalence of tobacco use." The bill also would direct the Secretary of Education to provide "incentive grants" to establish smoke-free schools. S. 1088, Sec. 5. With respect, we submit that additional federal spending is not required to stimulate anti-smoking activity in these areas.

ADDITIVES AND CONSTITUENTS; ENFORCEMENT

Mr. Chairman, the provisions of S. 1088 concerning ingredients ("tobacco additives") and tobacco smoke constituents ("tar," nicotine and carbon monoxide) substantially duplicate existing law. To the extent that these provisions would change existing law, the change would serve no demonstrable policy objective. The bill's enforcement and remedial provisions, moreover, go beyond the FDA scheme on which they purportedly are modeled.

Tobacco Additives

Sec. 2751(a)(1) would require each cigarette manufacturer to provide the Secretary with a list of all tobacco additives used in the manufacture of each tobacco product, and "the range of the quantities" of each tobacco additive used in all of the tobacco products made by the manufacturer. Sec. 2751(c)(1) would direct the Secretary to prescribe regulations requiring manufacturers to include on product packages, or in package inserts, information—

> "so that the public will be adequately informed of the tar, nicotine, carbon monoxide, and tobacco additives contained in any brand or variety of tobacco product, except that spices, flavorings, fragrances, and colorings may be designated as spices, flavorings, fragrances, and colorings without specifically naming each."

Sec. 275 1(c)(2)(A) also would authorize the Secretary to restrict or prohibit a tobacco additive if he determines that the additive, "either by itself or in conjunction with any other additive, significantly increases the risk of the product to human health."

Under existing law—the Comprehensive Smoking Education Act, enacted in 1984—the cigarette manufacturers are required to provide the Secretary of Health and Human Services on an annual basis "a list of the ingredients added to tobacco in the manufacture of cigarettes." 15 U.S.C. §1335a(a). The list provided to the Secretary need not identity the company involved or the brand of cigarettes that contains the ingredients. Ibid. Congress considered the disclosure of cigarette ingredient information on this basis to be adequate to "permit the federal government to initiate the toxicologic research necessary to measure any health risk posed by the addition of additives and other ingredients to cigarettes during the manufacturing process." H.R. Rep. No. 805, 98th Cong., 2d Sess. 21 (1984).

The Secretary, in turn, is directed to transmit to Congress periodic reports advising Congress of any information pertaining to such ingredients "which in the judgement [sic] of the Secretary poses a health risk to cigarette smokers." 15 U.S.C. § 1335a(b)(1)(B). Each year since 1986, the six major cigarette manufacturers have jointly submitted ingredient lists to the Secretary as required by the 1984 legislation. Last year, in response to a request by the Secretary, the manufacturers also supplied, on a confidential basis, a list of the quantity of each ingredient added to tobacco in the manufacture of cigarettes.

1. *Additive Regulation.* Secretary Sullivan has specifically stated that no additional authority is required at this time. The Department is actively reviewing the ingredient lists that have been submitted, and the manufacturers have offered to make their scientists available to assist in that review. To date, the Department has given no indication that the review has created any basis for concern. If the Secretary concludes that any additive does present a cause for concern, he undoubtedly

[21] Ibid.

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will so inform Congress as well as the cigarette manufacturers. The manufacturers repeatedly have informed the Secretary that they are prepared to cooperate fully with the ongoing additive review—promptly, voluntarily and without regard to their strict statutory obligations. It would be not only premature but counterproductive to enact broad new regulatory authority for which no showing of need has been made.

2. *Brand-Specific Disclosure to HHS.* There is no justification for requiring the identities of tobacco products—including specific flavorings, colorings and fragrances—to be reported to the Secretary for each tobacco product brand. Brand-specific ingredient information, in contrast to the composite information currently reported to the Secretary, is not necessary to perform a competent safety assessment. Brand formulas are highly valuable trade secrets. The unwarranted nature of this provision is illustrated by the fact that there is no comparable requirement to report or disclose to the Food and Drug Administration brand-specific ingredient information with respect to food or cosmetic products.

3. *Public Disclosure.* Neither is there any justification for requiring public disclosure of additive information on product packages or in package inserts. The only two possible justifications for mandating such disclosure of tobacco additives are that such disclosure would affect a consumer's choice of brands or his or her basic decision to smoke. There is no reason to believe that the disclosure mandated by the bill would have either effect. The vast majority of ingredients added to tobacco in the manufacture of tobacco—spices, flavorings, fragrances and colorings—would be exempt from public disclosure under Sec. 2751(c)(1). Other ingredients added to tobacco in the manufacture of cigarettes are eliminated in the production process and are not present in the product when it reaches the consumer. It would be misleading to require disclosure of such ingredients to consumers. Processing aids are exempt from food ingredient labeling requirements under FDA regulations. The provision contains no comparable exemption for such incidental additives in tobacco products.

Constituents

Sec. 2751(a)(1) would make it unlawful for any person to manufacture, import or package any tobacco product unless such person has provided the Secretary with a list of "tar," nicotine and carbon monoxide ratings for each brand. A tobacco product would be treated as "misbranded" if its labeling did not set forth "tar," nicotine and carbon monoxide information as required by the Secretary. Sec. 2753. As in the case of tobacco additives, the provisions concerning "tar," nicotine and carbon monoxide would be redundant.

Pursuant to a voluntary agreement and program entered into with the Federal Trade Commission, the major cigarette manufacturers already disclose in their advertising "tar" and nicotine ratings for the advertised brands.[22] The Commission also publishes carbon monoxide ratings on a brand-by-brand basis, supplied by the cigarette manufacturers at the Commission's request.[23] The Tobacco Institute Testing Laboratory (TITL), monitored closely by an on-site representative of the Commission, measures the "tar," nicotine and carbon monoxide levels of cigarettes sold in the United States.

The Commission has told the House Subcommittee on Transportation, Tourism, and Hazardous Materials that it is satisfied that its current arrangement with TITL enables it to ensure the accuracy of the "tar," nicotine and carbon monoxide figures supplied by the cigarette manufacturers.[24] With respect to other constituents of tobacco smoke, a representative of the Oak Ridge National Laboratory (ORNL) told the same Subcommittee in 1988, based on research conducted by ORNL, that testing for other constituents would not affect the relative ranking of cigarettes as determined by "tar" and nicotine or provide information that would affect a smoker's choice among the different brands of cigarettes that are available.[25]

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[22] See Latter of October 23, 1970, to Federal Trade Commission from Brown & Williamson Tobacco Corporation, et al.

[23] See e.g., Federal Trade Commission, "Report of Tar, Nicotine and Carbon Monoxide Content of 475 Varieties of Domestic Cigarettes," 56 Fed. Reg. 8,196 (Feb. 27, 1991).

[24] FTC Nicotine Program: Hearing before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Com. on Energy and Commerce 100th Cong., 1st Sess. 5–6 (1987) (statement of the Federal Trade Commission); id. at 10–11, 47 (testimony of William C. MacCleod, Director, Bureau of Consumer Protection, FTC); id. at 13, 7 (testimony of Daniel Oliver, Chairman, FTC).

[25] Cigarettes—Advertising, Testi and Liability: Hearings on H.R. 4543 before the Subcomm. on Transportation, Tourism, and I ardous Materials of the House Com. on Energy and Commerce 100th Cong., 2d Sess. 204 (1) (statement of Michael D. Guerin).

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There is no reason to require further disclosure of tobacco smoke constituents or to shift responsibility for overseeing such disclosure from the Federal Trade Commission to a new federal agency.

Enforcement

S. 1088 selectively incorporates by reference various remedies set forth in the Federal Food, Drug & Cosmetic ("FD&C") Act. Sec. 2742 (a), (d). Although the scheme established by S. 1088 bears some resemblance to the scheme established by the FD&C Act, the differences overwhelm the similarities. The attempt to incorporate by reference in S. 1088 the remedial provisions of the FD&C Act is a Procrustean device bound to produce confusion and irrational results.

In some respects, the bill's enforcement and remedial provisions appear to go beyond the FDA scheme. The Labor Committee stated that the Office of Regulatory Affairs is meant to have enforcement powers under the bill similar to those granted to the Food and Drug Administration. S. Rep. No. 112, supra at 40. Yet Sec. 2755 grants the Office of Regulatory Affairs, or any state employee commissioned by the Secretary, broad authority to conduct examinations and investigations relating to additives—apparently giving inspectors wide power to conduct physical inspections of cigarette manufacturing and storage facilities, to take samples and to inspect records. This is considerably broader inspection authority than FDA currently has over food and cosmetic facilities.

The bill also would prohibit commerce in any tobacco product that is "adulterated." Sec. 2741(a) (2)–(4). The bill's definition of "adulterated" is patterned on the FD&C Act definition but is modified in a way that makes it basically incomprehensible. Sec. 2761(1) defines "adulterated" to mean that—

> "a tobacco product contains any poisonous or deleterious substance or additive that may render it injurious to health, except that in the case of a substance or *additive that is not an added substance or additive* such tobacco product shall not be adulterated if the quantity of such substance or additive in such tobacco product does not ordinarily render it injurious to health." (Emphasis added.)

The provision's reference to an "additive that is not an added substance or additive" is incomprehensible.

ADDICTION WARNING

Sec. 3(b) of the bill would replace the existing carbon monoxide warning with an addiction warning. Mr. Chairman, this issue was the subject of a hearing in 1988 before the House Subcommittee on Health and the Environment. At that hearing—as at last year's hearings on S. 1883 and H.R. 5041—we testified against an addiction warning on the ground that calling cigarette smoking an addiction trivializes the serious narcotic and other hard drug problems faced by our society and undermines efforts to combat drug abuse. In addition, we noted that the "addiction" claim with respect to smoking is without convincing medical or scientific foundation.[26]

Such a claim defies all logic when, according to the former Surgeon General, nearly half of all Americans alive who ever smoked have quit,[27] and most of the 41 million smokers who quit did so without assistance.[28] Ironically, the presence of an addiction warning could serve to discourage some smokers from quitting—telling them, in effect, that they may not be capable of stopping smoking.

The characterization of smoking as "addictive" was addressed most recently in the lawsuit challenging the Canadian advertising ban.[29] In that case, the Attorney General of Canada attempted to establish that smoking is addictive. At trial, however, it emerged that the responsible government officials themselves consider "addiction" to be a term lacking in scientific meaning.[30] The definitions provided by the govern-

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[26] Health Consequence of Smoking—Nicotine Addiction: Hearing before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. 299 (1988); Tobacco Product Education and Health Protection Act of 1990: Hearing before the Senate Comm. on Labor and Human Resources. 101st Cong., 2d Sess. 79 (1990); Tobacco Control and Marketing: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 101st Cong., 2d Sess. 486 (1990).

[27] "Reducing the Health Consequences of Smoking: A Report of the Surgeon General," p. 292 (1989).

[28] "The Health Consequences of Smoking—Nicotine Addiction: A Report of the Surgeon General," p. 466 (1988). See also id. at 577, 580–81 (trends in quitting activity).

[29] *RJR-MacDonald Inc.* v. *Attorney General*, 82 D.L.R. (4th) 449 (1991).

[30] Liston, Vol. 70, pp. 10631–10641. Dr. Albert Liston, the Assistant Deputy Minister in charge of the Health Protection Branch of National Health and Welfare, testified as to his own views and described those that had been expressed by Dr. Cook, the Chief of the Drug Directorate within Health and Welfare.

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ment's expert witnesses were contradictory and on cross-examination these experts agreed that the word has no precise scientific or even popular meaning.[31] The trial court itself noted that, despite claims that nicotine in tobacco is addictive, "tobacco use has been in constant decline for over 20 years in all age groups."[32]

For these reasons, and the reasons discussed by Dr. Theodore H. Blau in his written statement today, and in his statement to the Labor Committee last year, an "addiction" warning is unwarranted and could be harmful. I direct your attention, additionally, to my testimony and the supporting testimony of Dr. Stephen M. Raffle and Dr. Blau at the 1988 House Hearing.[33]

WARNING LABEL FORMAT

Sec. 2752 would require the package warning labels mandated by Sec. 4(a)(1) of the Federal Cigarette Labeling and Advertising Act to appear on the front and back panels and "be in a size which is not less than 20 percent of the side on which the label is placed." The letters would have to be as prominent as other printed matter on the panel. As noted, the bill gives the Secretary authority to promulgate regulations implementing the new warning label requirements. See Sec. 2743. Citing this authority, it is foreseeable that the Secretary would be urged to impose "scare" formats such as those set forth in last year's Waxman bill (H.R. 5041)—white letters on a black background or black letters on a white background, red letters for the word "WARNING," heavy borders enclosing the label statement, and so forth.[34]

Mr. Chairman, the proposed warning format requirements are unjustified. They clearly are not intended to promote the traditional function of health warnings in cigarette labeling—to ensure that a person's decision "to smoke or not to smoke" is an informed one.[35] As discussed earlier, it is too late in the day to suggest that the new format is necessary because Americans are unaware of the claimed risks of smoking. By prescribing a format intended to shock, S. 1088 seeks not to enable people to make an "informed" choice but to induce people to make the choice that the bill's sponsors deem to be "correct."

Mr. Chairman, the proposed warning format not only is unnecessary but would violate the First Amendment. The Supreme Court has made clear that the government may regulate labeling and advertising only as necessary to prevent their being deceptive.[36] As the Ninth Circuit stated in an opinion by then Judge Anthony M. Kennedy, "there is no deception * * * unless the public holds a belief contrary to material facts not disclosed."[37] Further refinements in cigarette health warnings are unnecessary given the nearly universal belief among the public that smoking is harmful.

STATE AND LOCAL REGULATION OF CIGARETTE ADVERTISING AND PROMOTION

Sec. 2758 of the new title created by S. 1088 purports to effect a "partial repeal of Federal preemption on State regulation of advertising of tobacco products," as follows:

> "Nothing in this title, section 5 of the Federal Cigarette Labeling and Advertising Act * * * or the Comprehensive Smokeless Tobacco Health Education Act

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[31] Dr. Kozlowski, Vol. 41, p. 6416; Dr. Benowitz, Vol. 42, pp. 6595–96.

[32] 82 D.L.R. (4th) at 510–511.

[33] 1988 House Hearing, supra note 26, at 299–339.

[34] S. 1088 also would permit the Secretary to require that "tar," nicotine, carbon monoxide and additive information to be provided on the front and back panels, leaving little room for anything else. The end result would be to "turn cigarette packages into little textbooks, likely causing smokers to ignore it all." Comprehensive Smoking Education Act: Hearings on H.R. 5653 and 4957 before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce 97th Cong., 2d Sess. 355 (1982) (statement of Edward A Horrigan, Jr., Chairman of The Tobacco Institute's Executive Committee).

[35] See Federal Cigarette Labeling and Advertising Act, Sec. 2(1), 15 U.S.C. § 1331(1); S. Rep. No. 195,89th Cong., 1st Sess. 4(1965); H.R. Rep. No. 289, 91st Cong., 1st Sess. 19(1969) (additional views of Reps. Ottinger and Van Deerlin); H.R. Rep. No. 805,98th Cong., 2d Sess. 12 (1984). When Congress most recently revised the health warnings in 1984, Sen. Packwood stated that the purpose of the legislation was to "provide the American public with more information about the health hazards of cigarette smoking, so that they may make an informed choice as to whether or not to smoke." 129 Cong. Rec. 52682 (daily ed. March 11, 1983).

[36] See e.g., *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,771 n.24 (1976); *In re R.M.J.*, 455 U.S. 191,202–03(1982); *Bates* v. *State Bar*, 433 U.S. 350,385(1977). "A remedy for deceptive advertising which is broader than is necessary to prevent future deception or correct past deception is impermissible under the First Amendment." *Encyclopedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 972 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980). See also *Beneficial Corp.* v. *FTC*, 542 F.2d 611,618-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

[37] *FTC* v. *Simeon Management Corp.*, 532 F.2d 708, 716 (9th Cir. 1976).

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> * * * shall prevent any State or local government from enacting additional restrictions on the sale or distribution of tobacco products (including sales through vending machines and free sampling), on the placement or location of stationary outdoor advertising of tobacco products, or transit advertising of tobacco products under the control of State or local transit authorities, that is displayed solely within the geographic area governed by the applicable State or local government, to the extent consistent with the First Amendment to the Constitution."

At best, this grant of authority to state and local jurisdictions would Balkanize regulation of the advertising and promotion of a nationally marketed product. Such an outcome would be seriously at odds with First Amendment values. In addition, however, anti-smoking advocates undoubtedly would attempt to use S. 1088 to justify prohibitive state and local advertising requirements if not outright bans. Indeed, they could be expected to claim that "stationary outdoor advertising" includes signs affixed to a retail establishment advertising the tobacco products offered for sale therein.

It is more than foreseeable that the language of the bill would be invoked to justify censorship. Anti-smoking advocates already have attempted to promote restrictions on the "placement or location" of cigarette billboard advertising in a number of state and local jurisdictions that would amount to an outright ban.

Some of these proposals would impose a 1,000-foot prohibition on outdoor advertising for tobacco products Some would impose a 2,000-foot or even a ½-mile prohibition. One would even go so far as to prohibit outdoor advertising on publicly owned property in any residential area. Some would apply to outdoor advertising near schools only; others would apply, in various combinations, to outdoor advertising near schools, churches, playgrounds, hospitals, sports stadiums or arenas, mass transportation facilities and government-owned property generally.

The practical consequences of drawing circles, each with a 1,000-foot, 2,000-foot or ½-mile radius, around dozens of such locations in any given community should be obvious. And enactment of these proposals would only be the beginning. Once such proposals were enacted, efforts would be made to extend them—to turn 1,000-foot prohibitions into 2,000-foot prohibitions, ½-mile prohibitions into one-mile prohibitions, and to expand inexorably the list of places near which outdoor advertising for tobacco products is prohibited. Ultimately, outdoor advertising for tobacco products would be allowed only where no one could see it.

Sec. 2758 purports to authorize only state and local action "consistent with the First Amendment," but the practical significance of that limitation is questionable at best. The Labor Committee's report suggests that Sec. 2758 would allow state and local jurisdictions to regulate outdoor and transit advertising "as they see fit" S. Rep. No. 112, supra at 44. The Committee's report suggests no definite limits on what state and local jurisdictions might do in the name of regulating "the size or number of billboards and outdoor signs." Id. at 45.[38]

Findings (8)–(13) of S. 1088 suggest that tobacco product advertising and promotion are responsible for smoking among young people. Such findings have no place in this legislation. They are incorrect but would be cited to support state and local efforts to ban or severely restrict tobacco product advertising under color of the authority conferred by Sec. 2758—despite the Labor Committee's statement that it does not intend to encourage such action. S. Rep. No. 112, supra at 45.

Mr. Chairman, tobacco product advertising does not make people start smoking. Banning tobacco product advertising would not make people stop smoking. As Michael Pertschuk, the former Chairman of the Federal Trade Commission who now helps direct the anti-smoking lobby, stated in 1983, "[n]o one really pretends that advertising is a major determinant of smoking in this country or any other."[39]

The Labor Committee report suggests that cigarette advertising is improperly "targeted" at African-Americans and other minority groups. S. Rep. No. 112, supra at 44–45. This suggestion reflects a paternalistic and condescending assumption that certain groups in our society are especially "vulnerable" to cigarette advertising and should be "protected" from such advertising by censorship. If prevalence of smoking is taken as a measure of "vulnerability" to cigarette advertising, however, then Black and Hispanic youth are among the least "vulnerable" in our society. Just

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[38] The Labor Committee report does not affirm that state and local authorities may not directly or indirectly ban tobacco product advertising under the authority purportedly conferred by Sec. 2758. It merely affirms that the Labor Committee does not mean to encourage state and local jurisdictions to eliminate outdoor advertising and does not expect Sec. 2758 to result in the elimination of all tobacco product advertising or to constrain the ability of the manufacturers to engage in "national advertising campaigns." Id. at 45.

[39] Tobacco Issues, Institute of Politics, Harvard University, April 27, 1983, Tr. 8–9.

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last month, the Centers for Disease Control reported that the prevalence of frequent tobacco use among white students (15.9 percent) was approximately seven times that of Black students (2.3 percent) and approximately twice that among Hispanic students (7.4 percent).[40]

Confirmation that banning cigarette advertising would not reduce smoking prevalence among young people has been provided again and again by the experience of other countries that have banned or severely restricted cigarette advertising. The most recent confirmation was provided in reports this spring from Norway and Finland.

In Finland, tobacco product advertising has been banned completely since 1978. Yet a University of Helsinki survey published in 1989 had found that a higher percentage of 14- to 18-year-olds smoked daily in 1989 than when the advertising ban went into effect.[41] The study just published this spring in the Finnish Medical Gazette reported "a slight increase" in smoking among adult men and women (ages 15–64) between 1988 and 1990.[42] The study found that daily smoking among adult men increased from 35 percent in 1988 to 36 percent in 1990, and daily smoking among adult women increased from 20 percent to 21 percent in the same period. The authors state that smoking increased in Finland until 1976, two years before tobacco product advertising was banned. Then, "the consumption of tobacco products, and smoking among young people stated to fall. However, in the mid 1980's the figures once more started to rise, and on the basis of the situation of the early 1990's, smoking does not appear to be decreasing at the moment."

In Norway, tobacco advertising was banned in 1975. But according to a recent study in the Journal of the Norwegian Medical Association. the total incidence of daily smoking among Norwegian adults remained virtually unchanged between 1979 (38 percent) and 1989 (36 percent).[43] As the authors observe, smoking incidence in 1987 remained higher in Norway than in the United States or Great Britain; between 1977 and 1987, smoking incidence declined more slowly in Norway than in the United States or Great Britain; and smoking incidence among women in Norway increased during this period (from 29.7 percent to 33.3 percent). Assessing the impact of the 1975 ban, the authors concluded that: "Even though the law to stop tobacco advertising has a meaningful content we cannot see that it has had a fundamental effect upon the sale or use of tobacco."

Those who favor tobacco advertising bans claim that smoking among 13- to 15-year-old Norwegian schoolchildren has declined sharply since advertising was banned in 1975, reversing a supposedly upward trend. But how could juvenile smoking incidence have declined since 1975 if adult smoking incidence has remained essentially unchanged during the same period? There could be three explanations for this seeming paradox—many more people are waiting until adulthood to begin smoking; older generations of smokers are smoking much more than they used to, offsetting the decline in smoking among younger generations; or juvenile smoking incidence is not declining; The first and third of these explanations lend no support to advertising controls as a means of reducing consumption. The second explanation seems highly implausible since it is generally older groups that are quitting at the highest rates.

Anti-smoking advocates have cited a 1989 report of the Toxic Substances Board of New Zealand, which claimed that data from 18 countries proved that banning tobacco product advertising reduced smoking. That conclusion, however, depended on

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[40] "Tobacco Use Among High School Students—United States, 1990," MMWR, vol. 40, no. 36 (Sept. 13, 1991). Researchers at the University of Michigan's Institute for Social Research recently completed a study of smoking, drinking and illicit drug use among American high school seniors between 1976 and 1989. The researchers found that, after Native American high school seniors, white seniors had the highest rates for daily use of tobacco. Hispanic seniors had intermediate levels of tobacco use. Asian-Americans had the lowest rates, and Black seniors had levels nearly as low. The researchers suggested that these black/white differences for high school seniors may be somewhat smaller for high school dropouts but are not basically different "because Black and White dropout rates are now fairly similar." Moreover, during the past decade smoking rates for whites in this group remained essentially unchanged while rates have continued to drop among non-white groups. Bachman, et al., "Racial/Ethnic Differences in Smoking, Drinking, and Illicit Drug Use among American High School Seniors, 1976-1989," Amer. J. Pub. Health. March 1991, vol. 81, no. 3, p. 372.

[41] Rimpela, A, Rimpela, M., Hara-Etelahariu, M., Pykari, P., Suvola, M., and Karvonen, S. "Young People and Smoking 1973–1989." Helsinki: University of Helsinki, Department of Public Health Science, Publication 2/1989, 1989.

[42] Paavola, M., Tikkanen, J., Heloma, A, and Koskela, K. "Research on Attitudes Toward Smoking in Finland," Suomen Laakarilehti. 46, 1991/8: 721–724.

[43] Gotestam, K.O. and Gotestam, K.G., at 2260–1. See also subsequent correspondence with Dr. Bjartveit in the same journal: 1990, 18 (110): 2395–8; 1990, 19 (110): 2567; 1990, 20 (110): 2689–90 [including chart].

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the misclassification of certain countries with declining smoking rates as "ban" countries and other serious methodological flaws. As the Quebec Superior Court said of the TSB report in the Canadian advertising ban case:

> "[T]he Court can only note that [the TSB report] contains serious methodological errors and a lack of scientific rigour which renders it for all intents and purposes devoid of any probative value. It is a report with an obvious point of view and its conclusions reflect that point of view. In this regard, the Court agrees entirely with the analysis of the report made by RJR's counsel in his argument and concludes that the TSB Report, as a document, is of no probative value."[44]

The Canada Advertising Ban Decision

The Quebec Superior Court invalidated the Canadian advertising ban as violative of Canada's version of the First Amendment in a decision issued this July. The Court called the ban "a form of censorship and social engineering which is incompatible with the very essence of a free and democratic society." 82 D.L.R. (4th) at 502–04. The Court found that the Government had failed to satisfy its burden of showing that banning tobacco advertising would likely reduce consumption.

The Court issued its decision following a year-long trial at which more than two dozen witnesses presented testimony and 560 exhibits were filed by the parties, totaling tens of thousands of pages, "on every conceivable aspect of the problem." Id. at 456. The claims of the advertising ban proponents in Canada, which closely track the claims of their American counterparts, were subjected to exacting judicial scrutiny according to strict rules of evidence and rigorous cross-examination.[45]

The ad ban, imposed by the Tobacco Products Control Act, was challenged by the Canadian cigarette manufacturers in 1989, shortly after parts of the ban took effect. The Court held that the ad ban violated Canada's version of the First Amendment—Section 2 of the Canadian Charter of Rights and Freedoms. In overturning the ban, the Court applied an analysis similar to the *Central Hudson* analysis for judging restrictions on commercial speech under the First Amendment.

The Court condemned the Tobacco Products Control Act as a governmental attempt to control people's behavior "by suppressing the message which the State declares to be harmful and imposing the message which it declares to be the truth." 82 D.L.R. (4th) at 505–06.

"Freedom of commercial expression," the Court declared, "protects both the speaker and the listener and plays a significant role in allowing individuals to make informed choices." Id. at 504. "There is no evidence that the average consumer of tobacco products is deficient or incapable of judgment with regard to [tobacco] advertising." Id. at 510.

Calling the ad ban an unacceptable exercise in "paternalism" (id. at 504), the Court stated:

> "The question is whether the State has the right, through the elimination of all competing messages, to impose on its citizens its view and only its view of what is right in an attempt to mould their thoughts and behaviour?
>
> "The purpose and effect of [the law] is to prevent any message other than that prescribed by the State from reaching its citizens. As a result the Act effectively denies any form of individual responsibility or autonomy and, in so doing, determines for citizens what they are permitted to hear." Id. at 506.

The Attorney General tried to justify the ad ban by arguing that it would reduce tobacco use and thereby promote the public health. The Court found the evidence in this regard "deficient, if not non-existent." Id. at 515. The Court did not hesitate to find that Canada's attempt to ban tobacco advertising, with no evidence that doing so would reduce consumption, was contrary to the Charter of Rights and Freedoms and incompatible with the principles that should guide any free and democratic society.

Mr. Chairman, advertising is not harmful. As the Quebec Superior Court, quoting Aristotle, observed, "the word 'dog' never bit anyone."

PREEMPTION OF STATE TORT CLAIMS

Sec. 2757(b) specifies that nothing in the new tide of the Public Health Service Act created by S. 1088, ad nothing in the Federal Cigarette Labeling and Advertis-

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[44] *RJR-MacDonald Inc.* v. *Attorney General*, 82 D.L.R. (4th) 449, 503–04 (1991).

[45] The Government's chief expert witnesses on advertising issues included three American anti-smoking advocates—Dr. Joel Cohen of the University of Florida, Dr. Jeffrey Harris of the Massachusetts Institute of Technology and Harvard University, and Dr. Richard Pollay of the University of British Columbia, who is an American. All three have testified for plaintiffs in product liability cases against cigarette manufacturers in the U.S.

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ing Act or the Comprehensive Smoking Education Act of 1984, "shall be interpreted to relieve any person from liability at common law or under State statutory law to any other person." We strongly oppose this provision of the bill.

This provision, if enacted, would allow state tort claims challenging the adequacy of the health warnings mandated by Congress to be asserted against cigarette manufacturers in product liability lawsuits. It would empower judges and juries in each jurisdiction to second-guess in future cases the warnings required by Congress, ad to impose liability on manufacturers in such cases for failing to provide warnings deemed to be required under a state's tort law.

In testifying against a similar relaxation of federal preemption three years ago, former Attorney General Griffin Bell stated that "[t]he jury system should not be making the decision as to which warning is required to protect the public, health."[46] He stated, and we agree:

> "Where an issue has been determined to be national in scope, as with cigarette advertising and promotion, the rule of law should be part of a uniform national policy instead of being decided in hundreds and even thousands of jury rooms where each jury is free to essentially rebalance Congress' express findings."[47]

I commend to your special attention, in this regard, the eloquent testimony of our late former colleague, David Satterfield, before the House Subcommittee on Transportation, Tourism, and Hazardous Materials in 1988.[48]

At some point, Mr. Chairman, any industry faced with the prospect of still further regulation is entitled to say "enough." We clearly have reached that point with the regulation of tobacco products. S. 1088, which proposes regulation that is not needed and spending the federal government can ill afford, should be rejected.

I would be glad to answer any questions.

PREPARED STATEMENT OF JOHN JOYCE

Mr. Chairman, thank you and the members of the Committee for allowing me to address you today. My name is John Joyce and I am the executive director of the Maine Grocers Association. We represent 2,000 retail grocers in Maine.

Mr. Chairman, we are very much opposed to S. 1088, the "Tobacco Product Education and Health Protect ion Act," introduced by Senator Kennedy. Apart from the unwarranted bureaucratic schemes envisioned in the bill, we view S. 1088 as a costly and unnecessary proposal designed to address concerns that are already being handled effectively by other means and through the voluntary efforts of our association and our counterparts across the country.

You will find no disagreement from the retail business community that cigarette sales should not be made to minors. Retailers who are not responsible merchants are the exception to the rule, and laws to penalize them are already on the books.

The question is not whether the retailer should sell to minors, rather the bottom line is how to restrict those who are underage from attempting to make such purchases and to do so in a way that does not unduly damage retailers and their customers of legal age in the process.

We view education as the key. We have seen how education can change our lifestyle. Today we are eating healthier, driving more defensively, being more cautious with the environment and showing a greater concern for our natural resources. This came about through education and a re-examination of the way we approach important matters.

If tobacco "education" is truly one of the goals of S. 1088, then I suggest the Committee take a close look at a free and voluntary program that most of our members have adopted to help ensure that their employees understand and comply with laws prohibiting the sale of cigarettes to minors.

The program, which was initiated by The Tobacco Institute last year, is called "It's the Law." I would like to submit a copy of the Maine materials for the Committee's reference.

At no charge, "It's the Law" materials are made available to grocers and other retailers who sell cigarettes in states where the purchase age is 18 or 19. Through the use of signs and educational information, the program educates retail employees and their customers on the sale of cigarettes and helps to ensure that sales to underage youth do not occur.

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[46] 1988 House Hearing, supra note 25, at 291.
[47] Ibid.
[48] Id. at 374.

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My opinion is that our efforts are working. As I travel around my state, I can say that "It's the Law" materials are in use in 80-90 percent of the retail outlets I have visited. Signs noting the purchase age for cigarettes can be seen in our stores from Bangor to Portland. Yet the program entails more than signs in windows. The "It's the Law" program also provides retailers with practical information on state age laws, with tips on age verification, with information on acceptable forms of identification and even with advice on dealing with customers who become upset when asked for identification.

In other words, "It's the Law" is a comprehensive educational program that is meeting the needs of retailers and providing the necessary tools for us to minimize tobacco sales to minors. As I talk to my colleagues around the country, I know most of them have also adopted the "It's the Law" program or have made other voluntary efforts to address this concern.

For most of my members, this voluntary approach is not only effective, but cost efficient. Many grocers are small business owners, and they have ethical and legal obligations to their communities. They also have reputations to protect.

Mr. Chairman, a large number of my members operate on the slimmest of margins, often a one-percent net profit. They cannot spend time and money to develop individual awareness and educational campaigns on these types of issues, important as they may be. And even for us, as an association, such an undertaking is financially unrealistic.

Programs like "It's the Law"—a strong and effective campaign created and funded by private industry—help make our members' jobs, and the jobs of retailers around the country, that much easier and more effective.

Mr. Chairman, the Maine Grocers Association goes on record against S. 1088. While certain goals of the bill may be laudable, we know there are less costly and more reasonable ways of addressing the situation effectively. We know it because we are doing it right now, today.

Thank you.

PREPARED STATEMENT OF DEWEY STOKES

Mr. Chairman, Members of the Committee, my name is Dewey Stokes. I am president of the Fraternal Order of Police, the nation's largest organization of police officers with more than 225,000 members in 1,850 lodges in the United States. I am happy to be here today and I should say that the following statement is my own opinion and I am not being paid by anyone to appear before you.

In reviewing the lists of the countless hearings held here in Washington and in the various state capitals, I am always struck by the fact that, regardless of title, most address in some way the hazards the public and police officers face, the ways officers do their job or the public's understanding of the nature and dimensions of public safety in this new decade.

The legislation before you, Senate Bill 1088, affects all three. Through its many pages, this legislation seeks to keep tobacco products away from children and to educate the public against smoking. I do not present myself as an expert on the many provisions of this Bill, but I believe most police officers are experts on the protection of children. And so, Mr. Chairman, I will confine my comments to that vital goal.

I must begin by talking about the cold realities our children face.

Some of America's children have access to cigarettes and other tobacco products. Although our organization has never formally studied the question of children smoking, I am certain that our members would vote unanimously for any measure likely to discourage youngsters from smoking.

But that's not the most critical problem facing our children. I've heard the Surgeon General says cigarettes and illegal drugs—cocaine, crack and heroin—should be in the same category because they are all addictive. I'm not a scientist or psychologist but from a law enforcement standpoint that's ridiculous. He's not on the beat. He doesn't see what we see day in and day out—the destruction caused by illegal drugs. He doesn't see the crimes—burglary1 robbery, drive-by shootings etc.—caused by children and teens either hooked on illegal drugs, selling them to friends and classmates, or "running" them for drug dealers. He doesn't see the kids who are innocent bystanders who get hurt or killed. Smoking cigarettes may not be what we want our kids to do, but I firmly believe it could never compare to the devastation illegal drugs has on peoples' lives.

It is also true that America's children have access to automatic weapons and membership in sophisticated gangs that rival some armies in organization and skill. I can assure you the FOP has examined these issues. We regard them as serious

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and immediate threats to the lives of children. Many of our inner city schools and a growing number of suburban schools have become armed camps with uniformed officers and under-cover officers in hallways, restrooms and parking lots.

Outside the relatively safe school environment, kids are even more at risk. On the street and in suburban malls, children risk everything from random killings to enslavement by the animals who produce child pornography. Even in the home, children face violence that a decade ago would have been rare.

No police force in this nation is equipped to adequately protect children, much less the public as a whole, from all of these dangers. I know that as state and local budgets continue to be slashed, there will be fewer and fewer officers to deal with these larger problems. The days are gone when a mayor would threaten to cut police forces with a wink of his eye as a means of securing public support for new taxes. Today, the mayor cuts the police force and raises taxes.

That, Mr. Chairman, is the context within which we place this legislation. We do not oppose this Bill but I must say that we hope your committee and the entire U.S. Congress can find better ways to spend this kind of money. The threats to our children are much greater than whether they buy cigarettes or not. The limited federal resources you control should be channeled to the real dangers facing children—gangs, drug pushers, street violence and the like.

Mr. Chairman, permit me to make a second, more hopeful point.

Police officers cannot physically enforce all laws. Fortunately, many crimes are never committed because Americans, for the mostPart, understand, respect and obey our statutes and ordinances. Could you imagine what a typical four-way stop intersection would be like if that were not so? The impressive absence of litter on our highways has more to do with good people than good laws. At the local level we depend on law-abiding citizens and I know that at the federal level, you count on people paying their taxes voluntarily.

I mention this because locally we already have laws that seek to prevent children from purchasing cigarettes. In most places, state and local laws forbid the sale of cigarettes to children under the age of 18. How well do these laws work? We have not conducted an exhaustive study of the question but we long have relied on clerks and store managers to regulate the sale of cigarettes and with few exceptions they do a conscientious job.

Local action—through our schools, the responsible efforts of the store clerks and concerned parents—will prevent children from purchasing cigarettes. It is a worthy goal, one which the FOP wholeheartedly supports. But we cannot in good conscience put it very high on our list of ways to protect children in 1991.

Mr. Chairman, you well know that this nation's police officers face public safety hazards almost beyond imagination. Poll after poll demonstrates that the public well understands the serious nature of these threats. Let us focus our attention on the worst of those dangers and continue to rely on the fact that the vast number of law-abiding citizens will help us with the rest.

Thank you, Mr. Chairman, for the opportunity to address you today. I would be pleased to answer your questions.

PREPARED STATEMENT OF DR. THEODORE H. BLAU

I am a practicing Clinical Psychologist from Tampa, Florida. During the past 40 years I have seen over 5,000 patients of all ages. Among the many kinds of disorders I have treated are addictions to a variety of drugs. These addicted patients have included children, teenagers, and adults.

In addition to my clinical practice, I have been retained by various organizations to assess the merit of scientific research. These organizations include the United States Army, the Department of State, the National Institutes of Education, universities, state agencies, and private organizations.

I am Board Certified in clinical Psychology, Forensic Psychology, and Neuropsychology. In 1976 I was elected President of the American Psychological Association, the scientific and professional organization of over 70,000 psychologists in the United States.

I have been closely studying the scientific literature on smoking for approximately 13 years. During that time, I have reviewed over 10,000 research articles on smoking behavior and drug abuse. I have also conducted smoking cessation clinics, both in my office, and for the Manatee County, Florida Sheriff's Office, with whom I consult.

I am here today to address the statement that tobacco use is "addictive" in Sec. 2(6) of S. 1088 and the proposal to label smoking as "addictive" in Sec. 2771 of S. 1088. In my view, labeling tobacco use as "addictive" is misleading, potentially

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harmful to the American public, and contrary to the express provision of S. 1088 to "ensure the disclosure of accurate information to the public."

The label "addiction" has been abused in its application by scientists, as well as lay persons, to the extent that use of the label can cause confusion. scientists do not agree on the definition of "addiction." Distinctions between the terms "addiction," "habit," "compulsion" and "dependence" have become blurred. The word "addiction" has been used widely and loosely to describe many habits and everyday behaviors, including coffee drinking, love, video game playing and cigarette smoking. Some have attempted to replace the concept of "addiction" with that of " dependence. " Rather than bringing clarity, use of the term "dependence" has resulted in added confusion as different individuals and groups have defined "dependence" in different ways for different purposes. The terminology in this area remains confused.

The "addictive" warning label, as proposed in S. 1088, tells the public that a smoker may not be able to give up smoking. There is no scientific support for such a statement. To the contrary, the evidence clearly shows that smokers can and do give up the smoking habit. If the intent of the label is to convey to the public the idea that giving up smoking is like giving up addictive drugs, then this is also misleading and counterproductive.

My view of "addiction" is the view of a practicing clinician who sees people who are in deep trouble through drug use. The "addictive drugs" used by these people create problems different from difficulties associated with voluntary behaviors and habits such as smoking. Addictive drugs generally share common features such as intoxication when taken, tolerance effects, and significant withdrawal responses when the drug is given up. Use of these addictive drugs also tends to lead to certain lifestyles and social relationships. Giving up these drugs usually requires sacrifices and changes not necessary in giving up other behaviors.

Taking an addictive drug causes major interference with thinking and judgment of the user. This condition is intoxication. The drug addict, when intoxicated, cannot make reasoned decisions, including the decision to use or not to use the drug. Rational thinking is distorted. Smokers, on the other hand, are always able to reason without interference from their habit. Surgeons, aircraft pilots, train engineers, and people at all levels of responsibility, can work effectively and successfully, making important, difficult decisions without interference from their smoking.

When a drug addict gives up his or her drug, a severe withdrawal syndrome is very likely to result. Withdrawal can result in convulsions, hallucinations, significant pain, bodily dysfunction and in some cases death. During this withdrawal phase and for months or even years afterward the former drug addict is often unable to think clearly or act decisively in his or her own interest or within social and legal expectations. This is not true of smokers. The vast majority of those who have stopped smoking have done so with no help. Their lives have gone on with no disruption.

The addict's life usually involves friends who are also addicts and activities centered around the acquisition and use of a drug. The life of the addict precludes normal, law abiding family life, work or social pursuits. Consequently, successfully giving up an addictive drug requires that the former addict seek and develop normal friendships, social activities, and employment. For those who give up smoking, however, friendships, work and social activities remain essentially intact. No rebuilding of a life is required.

Smoking is not an addiction. To label it as an addiction is to place it in a category where it does not belong. This is likely to lead to misdirected policies, waste of funds, and useless, if not counterproductive, efforts.

Dr. Jack Henningfield testified before the Committee on Energy and Commerce of the United States House of Representatives in July 1988 that nicotine is as addicting as heroin or alcohol. At this same Committee hearing, the then Surgeon General of the United States, Dr. Koop, testified that "the addictive properties pharmacologically, and physiologically are the same for heroin, cocaine, and nicotine." Dr. Koop also testified that if tobacco use was illegal, like heroin and cocaine, then tobacco "addiction" would cause people to commit crimes in order to get tobacco. For example, Dr. Koop testified that "You take tobacco off the streets and there will be people breaking into liquor stores to get money to buy tobacco." I cannot agree with these statements in light of my clinical experience and my review of the research.

I have observed the effects of the use of addictive drugs. Individuals using cocaine are agitated, confused, unable to listen to other people, given to grandiose statements about themselves, and unable to face the destructive aspects of their own behavior while using this drug. Judgment is severely impaired. I have seen the hero in addict under the influence of this powerful drug acting unaware of the real world, unable to deal with any kind of an emergency, and thinking of nothing but the

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pleasure he or she gets from this substance. I have seen teenagers come to my group therapy sessions after having smoked marijuana. They don't hear what we talk about. Serious matters of family, school, and the expectations of society mean nothing when they are intoxicated by this drug. They are unable to deal with the realities of the future.

I have also treated and observed heroin addicts, cocaine addicts and alcoholics who are in the process of giving up these drugs. They, too, lack judgment, but in addition to this, their personalities are fragmented. They are fearful. They can tolerate little or no stress. In most cases they are so ill that they should be hospitalized and detoxified before long-range treatment is begun. They shake, they sweat, they have tremors. Some have gone into convulsions. The acute effects of such withdrawal last for only a week or two, but it may be years before the individual can tolerate any kind of normal stress without going back to the use of these addictive substances.

Those who state that cigarette smoking should be labeled an "addiction" suggest that "withdrawal symptoms" which some smokers report when giving up the smoking habit are similar to the symptoms experienced in giving up narcotic drugs. This is inaccurate. The alleged "withdrawal" symptoms experienced by some who stop smoking are generally the same kinds of frustrations that one would expect to see when someone discontinues any well established and well liked habit. Such symptoms as "missing the habit" and "mild irritability" are similar to the reactions experienced by those who give up coffee or sweets.

My clinical observations of smoking and smoking cessation over the past 40 years of practice, and my review of over 10,000 research articles relating to the subjects of smoking behavior and drug abuse, lead me to the following conclusions:

1. Few, if any, specific non-essential behaviors have been studied as extensively or produced more literature than the smoking habit.

2. People choose to smoke for many reasons. Each smoker usually has a variety of reasons why he or she chose to begin smoking, or chooses to continue the smoking habit. The same smoker may smoke for different reasons at different times.

3. The use of materials containing nicotine is not equivalent to the use of addictive drugs such as heroin, cocaine, barbiturates, or the excessive use of alcohol. Nicotine has some effect on people. The specificity of the effect is still, after many hundreds of studies, relatively unknown and variable. Some studies say nicotine affects heart rate, brain activation, appetite, motor performance, and a host of other psychological factors. When efforts are made to replicate these studies, the results are frequently different. The many thousands of studies on the smoking habit in the past 27 years do not demonstrate that nicotine in tobacco is an addictive drug. These studies do not support the concept that smoking is a psychiatric disorder. The role of nicotine in tobacco smoking is much more like the role of caffeine in coffee drinking.

4. People can and do choose to stop smoking. The process of quitting the smoking habit is very different from giving up addictive drugs. Those who choose to quit on their own are more likely to do so than those who are told to quit or who attend professional smoking cessation clinics. A small number of people have chosen to stop smoking through the use of professional help or smoking clinics. On the other hand, according to government figures in 1988, over 36 million people had quit smoking, entirely on their own, with no external help.

5. Those who quit smoking on their own are more likely to continue to decide not to smoke than those who seek external help1 or who prefer to view their habit as something they "can't control." The attachment of the label of "addictive" to cigarette smoking increases the likelihood that people will not quit smoking. They tend to blame their smoking on their "inability" to govern their own behavior. The labeling of smoking as an "addiction" serves as an excuse and as a rationalization to maintain the habit.

Smoking of tobacco is a habit. Those who choose to give up smoking usually do so on their own. I have worked and continue to work with people who have chosen to give up smoking. I can provide behavioral support and encouragement to them, but clinical experience, as well as research, shows that the inner decision to quit, coupled with the belief that one can do so, is most likely to lead to success. This is what one would expect with any habit. Those who call smoking an "addiction," who say smoking is out of their control, who claim to be victims, and who won't make a serious decision to quit, are not likely to quit smoking. Again, this is just what one would expect with any habit.

The underlying argument for placing an addiction label on cigarette smoking seems to be that by doing so smoking will decrease. In truth, if the goal of labeling cigarette smoking an addiction is to cause people not to smoke, then the evidence is that, if anything, such a label may have just the opposite effect. There is no sci-

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entific evidence that labeling smoking an addiction will keep people from starting smoking. As to quitting, the scientific studies we have indicate that people who believe that smoking is an addiction are less likely to quit than persons who believe that smoking is a habit.

A very real concern is placing an addiction label on smoking should be the misinterpretation of science in the name of public policy. If the Congress of the United States says that smoking is to be labeled an addiction, then treatment programs, research grants, neighborhood centers, directions of scientific research, insurance payments, and a host of other matters will be geared to this edict of the United States Government. The information to the public from science and government will be that smoking is an addiction, just like cocaine and heroin. If this is not true, then significant amounts of time, money, and public confidence in the government's understanding of drugs and addiction may be lost.

PREPARED STATEMENT OF RONALD D. ROTUNDA

S. 1088 is a bill that makes important factual assumptions about the role and effectiveness of advertising in initiating and promoting the use of a lawful product, and the role of Government in discouraging demand for a product by affecting the type and style of advertising that may be used. For example, § 2(a)(11) asserts categorically that: "convincing evidence exists that tobacco advertising creates market expansion and retention."

I am concerned that if S. 1088 becomes a law, it will be greeted as a green light to restrict, or de facto prohibit, advertising of tobacco products in many of the fifty states and thousands of local jurisdictions throughout the country. Once the government does that, others will pressure for similar regulations involving other products or activities (e.g., alcohol, fatty foods, high diving, etc.) that some people regard as improper, immoral, or too risky.

Before enacting laws based on such factual assertions, Congress would do well to consider an important new court decision in Canada, where Justice Jean-Jude Chabot, of the Quebec Superior Court, has just declared the entire Canadian Tobacco Products Control Act a violation of free speech guaranteed by the Canadian Charter of Rights and Freedoms.

The Canadian Act restricted free speech in the name of a greater good. The Canadian law prohibited advertising of tobacco products in Canada; restricted sponsorship activities of the tobacco industry; restricted the use of trademarks associated with a tobacco product in connection with any other product; and required the display of health warnings on tobacco products that were unattributed (that is, the warnings did not indicate that the State was the real author).The decision, *RJR-Macdonald, Inc.* v. *The Attorney General of Canada,* is important because it emphasizes the important protection afforded to advertising under Canada's Charter of rights and freedoms, and suggests the spirit in which we should consider legislation that would encourage attempts to ban or restrict tobacco advertising under our own First Amendment.

The Canadian Charter strongly reflects American influence on the importance of free speech. Arguably Canada gives its Courts more latitude to find that some restrictions on speech are justified. The Canadian Charter specifically provides that its free speech is subject "to such reasonable limits" as "can be demonstrably justified in a free and democratic society." The Canadian Government may restrict speech in order "to attain fundamental and important social objectives. * * *" Justice Chabot did not place an onerous burden on the Government. "The State need not wait for scientific 'certainty' before acting * * *," he said. The State need only show a preponderance of the evidence.

Yet—and this point is very significant—even though the Canadian Charter arguably offers less protection to advertising than our own First Amendment, Justice Chabot still concluded that the Canadian tobacco advertising restrictions are unconstitutional.

Justice Chabot recognized that the right to advertise is an important part of the right to free speech. Commercial speech, said the Court, "not only has intrinsic social value as a means of expression but, in addition, it constitutes an important aspect of individual self-fulfillment and personal autonomy." The Court concluded that advertising of tobacco protects the listener as well as the speaker, because such advertising "plays a significant role in allowing individuals to make informed choices." Advertising enables listeners to make informed choices by learning of new products, changes to products in terms of tar, nicotine, and so forth.

Justice Chabot emphasized that the Government restrictions on tobacco advertising constituted "a form of censorship and social engineering which is incompatible

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with the very essence of a free and democratic society." It is unacceptable "paternalism," he declared, for the Government to control what we can read and hear about a lawful product, and for the state to seek to control people's actions and thoughts about tobacco by eliminating "any message contrary" to the State's message. That is anathema in any democracy.

Canada tried to justify its restrictions on speech by arguing that the end (less use of tobacco) justified the means (a restriction on free speech). But during the extensive trial—it lasted over a year and produced "tens of thousands of pages" of exhibits; the Court heard the testimony of many experts; the judicial opinion alone was over 140 pages—the Attorney General of Canada could not establish that prohibiting advertising of tobacco would likely affect the use of the product. The Court did not demand "scientific 'certainty,'" but only a reasonable probability. Yet Canada could not meet that burden of proof.

Advertising does allow manufacturers to establish brand loyalty, to encourage people to shift from one brand to another, and to introduce people to new products. But the Court examined the evidence very carefully, and found that it simply did not show a link between increased advertising and increased smoking (nor was decreased advertising linked with decreased smoking). Some foreign countries prohibit tobacco advertising, while others allow it; but the studies and experts offered by the Government did not demonstrate a causal relationship between the amount of advertising and the rate of smoking. Even Canada's expert witness (during cross examination) was forced to admit that.

The Court assumed (although it did not expressly find) that tobacco products are harmful, but nonetheless was forced to conclude that speech about tobacco products is not. As the Justice pointed out, quoting Aristotle, "the word 'dog' never bit anyone."

This result should not be surprising. If we were all helpless slaves to the supposed power of advertising, we would be driving Edsels today. Communism would not have fallen in the U.S.S.R.; after all, it had three-quarters of a century to propagandize its people. The notion that we, the people, have no minds of our own is inconsistent with the basic assumption that underlies democracy. As the Court pointed out—

> "Even if it were accepted that nicotine in tobacco does give rise to a certain state of dependence, what connection has that with advertising? With or without advertising, nicotine will or will not continue to create a state of dependence. Notwithstanding this state of dependence, tobacco use has been in constant decline for over 20 years in all age groups despite the large amounts spent by the industry during this period."

The Court also carefully examined the "Toxic Substances Board Report of New Zealand" [the T.S.B. Report], published in May, 1989. This report—which is frequently cited by tobacco advertising opponents—attempts to link advertising with consumption. Justice Chabot examined this Report in the neutral, objective atmosphere of a courtroom. The Justice's conclusion is worth quoting:

> With respect to the T.S.B. Report, the Court can only note that it contains serious methodological errors and a lack of scientific rigour which renders it *for all intents and purposes devoid of any probative value.* It is a report with an obvious point of view and its conclusions reflect that point of view. (emphasis added)

The Court agreed with RJR-Macdonald counsel's analysis of the

Report that the T.S.B. had manipulated the data to reach predetermined results. "If Portugal were shown in the few media group with Italy and Sweden, the result, *using the T.S.B.'s own methodology,* would be that countries with a 'total ban for health reasons' had a lower rate of decline in consumption than those countries which permit advertising in few media or most media." Annexes to Memorandum of Argument of Applicant RJR-Macdonald, Inc., p. 28, ¶ 55, tab C (emphasis added). In other words, more advertising was correlated with a decline in tobacco consumption!

The supposed factual "findings" of S. 1088—such as § 2(a)(11)'s statement that "convincing evidence demonstrates that tobacco advertising creates market expansion and retention"—are mere assertions, ipse dixits. That creates a problem under the First Amendment. In commerce clause cases, the Court generally will accept Congressional factual findings. In First Amendment cases, however, the Court exercises fact review. Mere assertions of fact will not save the law. The Court will have to make its own findings. E.g., *In re R.M.J.*, 455 U.S. 191, 205-06, 102 S.Ct. 929, 939, 71 L.Ed.2d 64 (1982) (in light of the commercial speech cases, lawyer cannot be disciplined for advertising unless the record below showed that the statements were misleading).

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It is true, of course, that this Congress is not technically bound by the factual conclusions of Justice Chabot's decision, which took place in another jurisdiction. But facts do not change once they cross a border. Most of the Government's advertising experts were American antismoking advocates. In addition, the methodological errors in the T.S.B. Report are fatal flaws; the factual assumptions that form the basis of S. 1088 are similarly unsupported.

An important lesson of Justice Chabot's opinion is that the best remedy against the speech we do not like is more speech, not less. For those who think that advertising is so powerful, let them publish their own advertisements urging people not to smoke. If we do not like what someone is saying, the proper democratic response is more speech, not enforced silence of those with whom we disagree.

It is true that opponents of tobacco advertising claim that their assault on tobacco advertising will not be a dangerous precedent weakening the First Amendment because tobacco is supposed to be a unique product. However, it is important to remember that this is the cry of every group that seeks to weaken the protection of the Bill of Rights. Similarly, during the first third of this century, the supporters of Prohibition argued that alcohol was also unique; the people were promised that if they only would engage in what was then called a "Noble Experiment," the results would be less crime, increased productivity, better health, and so forth. Instead the legacy of this Noble Experiment has been gang warfare and organized crime, a bequest that continues to this day.

Justice Chabot rejected, as without factual foundation, arguments that tobacco advertising must be controlled, because the product is unique, or because such advertising is "inherently" misleading because of its "persuasive or subtle form," or because it is necessary to protect "young people from inducements to use tobacco." Even Canada's own Department of National Health and Welfare repeatedly advised that "banning tobacco advertising would have no effect on consumption. * * *"

Justice Chabot said that the basic question is: "whether the State has the right, through elimination of all competing messages, to impose on its citizens its view and only its view of what is right in an attempt to mould their thoughts and behaviour?" He answered that question in the negative, and quoted John Stuart Mill:

> "Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."

Our First Amendment—which Justice Chabot, quoting the Canadian Supreme Court, referred to as the "'firstness' of the First Amendment"—is a beacon of light that the whole world sees. The wave of the future is not Communism; it is Democracy and freedom. As we celebrate the 200th Anniversary of the Bill of Rights, we should not forget that one of the most important things that we have done is to export what the Bill of Rights represents. We have exported it to Canada, to Eastern Europe, and to China.

When we refer to the balance of trade, we typically think of numbers and dollar signs. But that is a poor measure of all that we transfer abroad; it ignores the tremendous export of American ideas and culture. People in this country often do not frilly appreciate the significance of the export of our belief in democracy and free speech. It is the power of the idea of democracy and of free speech that accounts for the eagerness with which foreigners eagerly seek to learn about American political ideas. When we celebrate the Bill of Rights, we celebrate the two hundredth anniversary of America's grandest export.

It would be sad indeed if we were successful in exporting our belief in free speech, but then undercut that freedom here at home.

Prepared Statement of Dr. Richard W. Mizerski

I. PERSONAL BACKGROUND AND QUALIFICATIONS

I am a Professor of Marketing in the College of Business at Florida State University in Tallahassee, Florida. I received my B.S. degree in Business Administration from Northwestern University in 1968, with a major field of marketing and a minor field of advertising. I received my Ph.D. from the College of Business Administration at the University of Florida in 1974, with major fields of marketing and economic theory, and minor fields of advertising/ communication and labor economics.

I have been on the faculty at Florida State University since 1980 and have served as Director of The College of Business Behavioral Laboratories since 1985. 1 served as Chairman of the Faculty of Marketing in the 1985-1986 academic year. Previously, I taught Advertising and Marketing at the University of Cincinnati from 1976 to 1979, at Arizona State University from 1974 to 1976, and at the University of Florida from 1971 to 1973. I teach or have recently taught courses in marketing,

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marketing research, consumer behavior, marketing strategy, promotion, media, and advertising campaigns at the undergraduate, masters, and doctoral level. I have chaired over ten dissertations in marketing, and have sat on many more dissertation and masters committees throughout the university.

In addition to teaching, I actively research and have produced commercial reports and published scholarly articles on a variety of subjects in the fields of marketing and consumer behavior, including how advertising affects consumer purchasing decisions, the effectiveness of advertising and marketing strategies on consumption, promotion strategy, the measurement of advertising effectiveness, studies investigating the relationship between advertising and promotion expenditures and product sales, and the field testing of corrective statements in consumer advertising.

My employment history also includes an appointment in 1979 to the Washington, D.C. office of the Federal Trade Commission ("FTC") as a staff consultant on consumer behavior, advertising, and marketing. While at the FTC, I worked with a team of attorneys, paralegals, and researchers that evaluated cigarette industry advertising and marketing practices. My participation involved the investigation of a wide range of issues including whether advertising had any effect on the initiation of cigarette smoking, the consumption patterns of present smokers, the attitudes, beliefs and knowledge of both smokers and nonsmokers regarding cigarette health concerns associated with smoking, the effectiveness of advertising bans and promotional activities, and the effectiveness of health warnings, including whether cigarette advertising undercuts those health warnings.

As part of my assignment at the FTC, I evaluated previous research and talked to experts in marketing, psychology, and medicine. I collected, or assisted in collecting, qualitative and quantitative primary data addressing these issues. My efforts included developing marketing, economic, and consumer psychology arguments for possible FTC actions on the marketing and advertising of cigarettes. I was also involved in testing the effectiveness of the then present health warning on cigarette packages and advertisements, as well as testing the potential effectiveness of proposed new warnings. Some of this information was contained in the 1981 FTC Staff Report on the Cigarette Advertising Investigation.

While at the FTC, I was also called upon to develop and test warning labels for the Jeep CJ-5. Theses vehicles had unusual stability problems that could lead to unexpected rollovers. Warning labels to that effect were placed on the vehicles while they were in production. I left the FTC in December, 1980, to return to teaching and independent research, but continued as an outside consultant for the Washington office until 1982.

In a somewhat related matter, I was the contracting officer on the largest study ever conducted on the possible effect of advertising on adolescent and teen initiation of alcohol use. My duties included ensuring that the data were collected, analyzed and interpreted properly. This study was funded by the FTC and nine other organizations including the Food and Drug Administration, and the Bureau of Alcohol, Tobacco and Firearms of the U.S. Treasury.

I recently worked with the FTC Atlanta Regional Office as a consultant and expert witness in an investigation of several consumer product promotions. My responsibilities included reviewing the advertising and other materials associated with these promotions to determine if those materials were false, misleading or deceptive, and the probable consumer response to those promotions.

I also recently worked with the State of Florida as a consultant and expert witness in investigations of several consumer-oriented promotions. Again, I was requested to review and analyze the advertising and promotional material associated with the promotions to determine if those materials were false, misleading or deceptive. My tasks included evaluating various information remedies for their ability to provide potential consumers with salient data for decision making. This past spring I assisted the Florida State Lottery in evaluating potential new advertising and promotion for their lottery products. Part of that task was to help choose a new advertising agency.

I now work with several consumer package good marketers as an outside consultant concerning pricing, distribution, new product development and promotion. Although these product categories do not pertain to tobacco, they are similar in that they are also in the maturity stage of the product life cycle.

II. OVERVIEW

I have recently reviewed the bill Senator Kennedy has introduced, S. 1088, titled the "Tobacco Products Education and Health Protection Act of 1991." The bill sets forth a series of findings relating to the claimed impact of warning labels and the

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claimed effects of advertising. I was particularly struck by the inaccuracy of many of its findings, and the potentially fruitless nature of its labeling requirements.

Based on my advertising related experience and reading of the available research, in my opinion the following findings and proposed labelling requirements, all of which fall within my area of expertise, are not substantiated:

1. Most young people are not sufficiently informed about cigarette use (Finding 7).
2. Advertising and promotion significantly contribute to young adults, and children's experimentation with and initiation of regular cigarette smoking (Finding 8).
3. Only 10 percent of cigarette users switch brands each year (Finding 10).
4. Convincing evidence demonstrates that cigarette advertising creates market expansion and retention (Finding 11).
5. Cigarette advertising and promotion appeal to the youth (under 18) market through advertisements suggesting a strong association between smoking and physical fitness, attractiveness, success, etc., and that these alleged appeals influence minors to initiate smoking (Finding 13).
6. That serious gaps in knowledge about the claimed effects of tobacco use persist in both minors and the adult population—specifically concerning lung cancer, heart disease and effects on pregnancy (Finding 14).

The vast literature on advertising and promotion clearly shows that these statements are incorrect. The effects of advertising and promotion for cigarettes are the same as for other products that are in the maturity stage in the product life cycle, and prompt changes in market share only. Additionally, levels of salient health information concerning smoking are at very high levels that would not be expected to increase with the proposed labeling remedies.

III. OPINIONS

1. Advertising Does Not Cause People To Initiate Smoking

During the course of my work with the FTC in 1979-1980, I reviewed many articles and studies on the potential effect of advertising on the initiation of smoking. As a result of this work, I formed the opinion that cigarette advertising and promotion had no effect on an individual's decision to become a smoker.

Since 1980, I am unaware of any new studies or changes in the advertising practices of cigarette manufacturers that would lead me to change this opinion. In fact, several recent reviews have continued to suggest that conclusion. For example, Moschis (1989) recently reviewed the literature and reported no empirical justification for saying "advertising creates in any way the desire to initiate smoking and maintains smoking habits among the young."

Research which investigates the process whereby people decide to become smokers focuses on, among other things, the attitudes people develop toward smoking early in life before they try their first cigarette and on their actual experience with smoking. These have been found to be reliable predictors of whether a person will or will not become a smoker (Leventhal and Cleary 1980; Flay et al. 1983). The research reveals that advertising has a negligible impact on that decision process.

Studies show that people acquire attitudes toward smoking as children, long before they try their first cigarette (Leventhal and Cleary 1980). It has been consistently reported and is well accepted that parents, siblings and peers are the most powerful influences in shaping one's attitude about cigarette smoking. In addition, smoking-related beliefs are primarily learned through interpersonal experience with family and friends. The existence of parental, sibling and peer smoking tends to lessen any negative attitudes and reinforce any positive beliefs about smoking. Dr. Mortimer Lipsett, of The National Institute of Child Health and Human Development, told Congress nearly a decade ago that if one parent smoked, the child is twice as likely to smoke as one reared in a non-smoking household. If both parents, or one parent and an older sibling smoke, the chances become four to one. Once attitudes and beliefs about a product or brand have been formed, they have not been found to be altered significantly through commercial media messages (Moran 1991; Achenbaum 1982).

Moreover, prior to their initial trial with cigarettes, young people develop images of what "the smoker" is like. Not surprisingly, those whose self-image more closely fits a stereotype of "a smoker" are more likely to become one (Chassin et al. 1981; Barton et al. 1982). However, this stereotypical image of the smoker is not especially flattering, as one might expect to find if advertising were exerting significant influence (McKennell and Bynner 1969). The actual image of "the smoker" is decidedly ambivalent and somewhat negative (despite the alleged efforts of cigarette advertising to foster a "positive" image). This strongly suggests that the image of "the

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smoker" that young people develop would not be derived from cigarette advertising that is alleged to portray "physical fitness, attractiveness, etc."

Most people experiment with cigarettes. It has been asserted that between 80 and 90 percent of all teenagers try a cigarette at some time (Flay et al. 1983; Hirschman et al. 1984). However, only a relative small percentage of those who try cigarettes become smokers. Leventhal and Cleary (1980) report that the percent of smokers in grade school, junior high school and senior high school rarely exceeds 50 percent of the triers.

In addition to attitudes toward smoking, peer pressure appears to be a primary factor in determining whether a person will experiment with smoking. Most youngsters try their first cigarette in the company of others (Friedman et al. 1985), and there is usually pressure to participate in the group activity. In accordance with this and other similar research, Diglan and Lichtenstein (1984) concluded that "peer influence is the preeminent factor in the onset of experimentation" with cigarettes.

Hirschman et al. (1984) examined factors that lead triers of one cigarette to try a second cigarette. Whether a person tries a second cigarette is associated directly with the person's attitude toward smoking, whether the person has siblings who smoke, whether the person's friends smoke whether the person is a "risk-taker", and whether the person coughed while trying the first cigarette.

Studies which specifically address advertising as a potential factor in the process of smoking initiation have found that young people are both critical and distrustful of its message (e.g., Levitt and Edwards 1970; Beal et al. 1971; Kelson et al. 1975). This distrust, combined with the negative stereotype of the smoker, provides strong evidence that advertising is rather ineffective in influencing one's attitude about smoking. Rather, attitudes result from a complex array of interpersonal factors, and it is these factors which are of primary influence in determining who will become smokers.

In summary, my research and study of the literature have revealed no significant evidence to indicate that advertising either causes people to start smoking or shapes attitudes towards smoking.

2. Advertising Does Not Drive Primary Demand

The overwhelming weight of research concludes that cigarette brand advertising does not influence "primary demand" for cigarettes by converting nonsmokers into smokers, by encouraging current smokers to increase consumption, or by discouraging current smokers from quitting. Instead, the impact of cigarette advertising is found in "secondary demand", by influencing the particular brand that a smoker chooses. In other words, the primary influence of cigarette advertising is in its effect on the market share of particular brands (see Wilcox 1991). It has not generally been reported to cause an increase in the aggregate demand for cigarettes. Advertising influences the particular brand that a consumer chooses without affecting overall demand for cigarettes.

The vast majority of studies, utilizing time-series model analyses, support this assertion. In each, a comparison of cigarette consumption or sales and advertising expenditures consistently reveals that advertising has no significant influence on primary demand. Examples of these studies follow.

Hamilton (1972) examined a time-series model of cigarette consumption using data involving the U.S. market between 1925 and 1970. Advertising was measured by an index of per capita advertising expenditures. Advertising failed to exert a statistically significant effect in any of the dozen models tested by the author.

Schmalensee (1972) tested 72 models of aggregate cigarette demand within the U.S. market for the period 1953-1967. Taking all of the model results into account, he reported that the evidence was insufficient for him to conclude that advertising had any effect on primary demand.

Schneider et al. (1981) examined a time-series model of cigarette consumption using data for the U.S. market between 1930 and 1978. Again, advertising, even when previously allowed on television and radio, did not have a statistically significant effect. The authors concluded that "[g]iven the trivial effect of advertising on aggregate cigarette consumption, governmental prohibition of broadcast cigarette advertising could not have had any significant effect in terms of reducing demand."

Baltagi and Levin (1986) tested several time-series models of cigarette consumption using data involving 46 states in the U.S. over the period 1963-1980. These models estimated per capita cigarette consumption as a function of cigarette prices, per capita disposable income and per capita advertising (television and radio only) expenditures. Their analysis revealed "an insignificant effect of advertising on the consumption of cigarettes." Waterson (1990), in reviewing this issue, found that "brand advertising expenditures1 in aggregate, are most unlikely to have any impact on the size of mature consumer markets such as the tobacco market."

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That cigarette advertising does not influence primary demand and cause increased consumption is not a surprising discovery. In mature product categories, or those with a long history in the marketplace, advertising has consistently been found to influence market share rather than consumption (Ehrenberg 1982). Similar conclusions have been drawn in studies of the alcohol, food, clothing and motor vehicle industries. Peles (1971) did not find advertising to influence primary demand for beer. Similarly, Bourgeois and Barnes (1979) report that neither print nor broadcast advertising expenditures were significantly related to alcoholic beverage consumption in Canada. Wilcox , Vacker and Franke (1986) found similar results when they looked at alcohol beverage advertising in the United States and concluded, "The findings indicate that advertising expenditure levels have no important relationship with aggregate consumption." Kyle (1982) reached a similar conclusion in a study of food, clothing, alcohol and motor vehicles, dismissing as a "myth" the view that advertising increases market size (see also Sturges 1982; Ashley et al. 1981).

Unlike the previous studies that look for significant correlations of advertising to product consumption, Ashley et al. (1980) tested for the often hypothetical causal connection between the two. They found "no significant statistics suggesting that advertising changes affect consumption." Rather, their "empirical results were consistent with a model in which causation runs only from consumption to advertising." An axiom of advertising is that successful brands get bigger budgets.

3. Brand Switching in the Cigarette Market

One of findings in this bill is that only 10 percent of cigarette users switch brands each year. This is not true. The cigarette market, like other consumer package goods markets, has relatively high levels of switching.

The reports of low switching rates (e.g., Fortune 1985) come exclusively from self-reports of smokers. Kozlowski et al. (1980) provides an extensive critique on smokers self-reports and concludes that they are highly unreliable. The inability of individuals to provide accurate self-reports is well documented in many fields (e.g., Nesbitt and Wilson 1977), and for many products.

Actual, as opposed to self-reported, switching data has been reported for the UK (Goodhardt, Ehrenberg and Chatfield 1984), and showed cigarette brand switching between companies at 30 percent. Also, a 1989 survey of 2,000 consumers by Peter D. Hart Research Associates, cited by the Wall Street Journal in an October 19, 1989 article, reported that 71 percent of smokers are "loyal to one brand"—thus indicating that 29 percent frequently switch brands. These figures are not unlike those found for margarine, toothpaste and soup—also mature product categories. Switching between brands, irrespective of company, is probably over 50 percent and reinforces the validity of a brand share, not market expansion, strategy (Ehrenberg 1972).

It is also important to note that cigarette companies not only use advertising to get consumers to switch to their brands, but they must also make sure that their present customers do not switch to other brands—the defensive aspect of promotion strategy (Schultz and Robinson 1982).

Although the size of the industry's advertising and promotion expenditures appears large, it is more appropriate to review it against other consumer package good industries. To put this in perspective, the advertising to sales ratio of the cigarette industry in the U.S. is 5.7 percent. This compares with 9.5 percent for the non-alcoholic beverage industry, 6.9 percent for can/frozen preserves, fruit and vegetables, 9.4 percent for grain mill products, 6.9 percent for ice cream and frozen desserts, and 7.7 percent for soap, detergent and toilet preparations and cleaners in the 1989 calendar year (Schonfeld 1989).

4. Level of Health Information and Smoking

Extensive survey evidence (e.g., 1981 FTC Staff Report on the Cigarette Advertising Investigation) indicates that both adults and youth have a very high awareness of, and belief in, the claimed health consequences of smoking. For example, a 1980 study by Chilton Research Services (Chilton 1980), commissioned by the Federal Trade Commission, had a nationally projectable sample that specifically captured the extent of information possessed by teens and young adults, and more importantly, the relationship of that knowledge to current and future predictors of smoking. The study used phone interviews to collect data from 1,211 teens and 407 adults 29-31 years old. The results indicated that 90.6 percent of the teens and 93.6 percent of the adults believed that smoking caused throat cancer. Very similar findings were reported for the relationship of cigarette smoking to heart disease (90.2 percent of the teens, 90.7 percent of the adults), lung cancer (93.1 percent teens, and 92.1 percent adults) and effects on an unborn baby (90 percent teens or adults). A 1985 U.S. Department of Health and Human Services survey (U.S. Department

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of Health and Human Services 1985) reported that between 71 percent and 83 percent of those 18 to 29 years old felt that smoking increased the chances of several very specific problems in pregnancy. That figure is no doubt higher today.

The Chilton report did report a lower level of reported knowledge about specific health information such as the allegation that 85 percent of lung cancer cases are caused by smoking (32.3 percent teens, 26.3 percent adults). However, the potential importance of having this level of knowledge of alleged smoking effects is very suspect. The report found no statistically significant association of specific knowledge to current smoking behavior, or to attitudes, values, or intentions to smoke in the future. In other words, having the specific health knowledge supported in the Federal Trade Commission staff report in 1981, bore no relationship to smoking behavior now or in the future (see Chilton 1980). Although questions can be framed to show lower levels of knowledge (for example, about additives), that does not mean that information will influence smoking behavior. I don't believe the research could support any other conclusion.

Yet another study by Shor et al. (1980) looked at beliefs of college students about smoking and its claimed health effects. Smokers and nonsmokers held the same beliefs on 9 out of 10 statements concerning cigarette smoking and health. While a difference was detected on one statement,[1] both groups so strongly believed it that meaningful differences were not found.

Finally, a 1985 Audits and Surveys Inc. study reported 99 percent of those polled "had heard that cigarette smoking is dangerous." Just how pervasive must health information be? There simply is no support that salient health information about smoking is lacking in the general or youth segments of the population.

5. New and Larger Warnings Are Not Needed

I worked on two cigarette advertising warning label studies while at the FTC. The first study by Walker Research, Inc. (1980) tested for the best wording of potential warning labels. Twelve different topics for disclosures were considered. Three different versions for each of 12 different areas for disclosure were tested on 805 individuals from various parts of the country. Each respondent chose the version "which made them think most about the effects of smoking on a person's health," or "the most thought-provoking version." In total, the results of this study indicated no significant differences in the way smokers and non-smokers viewed the warnings, thus demonstrating a lack of difference on how these two groups think about possible smoking related health effects. Respondent age also failed to show any association with their reaction to potential health warnings on ads.

The second study was a two part project fielded by Burke Market Research Inc. (Burke 1980). An initial series of focus groups were conducted to better understand the degree to which various segments of consumers (e.g., teens, women) had knowledge about smoking and health, and how they chose to use this information in their behaviors. Although this is qualitative, not quantitative data, it clearly showed that smokers were knowledgeable, and that they chose to smoke nonetheless. You can force information on consumers, but you can't effectively force them to use it the way you want them to.

The second phase of the project involved testing the most understandable and compelling warning statements from the Walker study (Walker 1980), in several different formats. For example, the arrow and circle format now used in chewing tobacco ads was first tested (with a different warning) in this phase. The warnings and formats were put on existing cigarette ads and tested against the original (then present) Surgeon General's warning that "cigarette smoking is dangerous to your health."

The ads were put into a portfolio of print ads, then shown to each of 1228 respondents in six cities. The respondents were asked to recall the ads and warnings they could remember.

One format was over twice the size of the then current rectangle. I believe the results of this experiment can help predict the effectiveness of increasing the size of the warning label on packages or cigarettes. The respondents failed to recall the larger format significantly more than the then current 50 percent smaller rectangle. this is particularly noteworthy in that a new heart attack warning was placed in the new larger format. One would expect that a novel message (not unlike the new "addictive" warning suggested) would prompt more attention and be more memorable, but it was not.

In my opinion, the research conducted on cigarette warnings while I was at the FTC demonstrates the ineffectiveness of what S. 1088 is attempting to accomplish.

[1] "Smoking causes, contributes to and aggravates cardiovascular diseases, emphysema, bronchitis, lung and other concerns, and a variety of other medical conditions."

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fly requiring more prominent warnings, S. 1088 is either (1) attempting to make the public more aware of the warnings, and/or (2) attempting to change smokers' behavior. To the extent S. 1088 is attempting to increase public awareness, it is unnecessary because the public is already fully informed. To the extent it attempts to change smokers' behavior, it fails to understand the likely effect of warning labels. The FTC research clearly indicated that smokers are as aware and fully informed as non-smokers, yet they continue to smoke. I do not believe new or more prominent warning labels will change the fact.

CONCLUSION

Although this bill may be well intentioned, many of the premises on which it is based cannot be validated. In fact, the most important assumptions about the influence of promotion and health knowledge are not substantiated.

The effective use of product warning labels requires that the information provided is (1) salient to the decision-making processes of the product, (2) that it is not adequately known, and (3) best transmitted when the product is in hand, ready to be purchased or used. Given these reasonable criteria, I do believe the warning remedies required in this bill will not affect smoking behavior.

PREPARED STATEMENT OF FRANK BALISTRERI

I am writing to express my opposition to Senate Bill S. 1088, the Tobacco Product Education and Health Protection Act of 1991. I am Chief of Police in Waunakee, Wisconsin, a suburb of Madison. I formerly served as President of the Dane County Chiefs of Police Association and I have served on numerous committees for the Wisconsin Chiefs of Police Association.

As Chief of Police in a suburban Midwest town, I see many different crimes committed by all types of people—from first-time offenders to hardened criminals. While the crime rate in Waunakee may pale in comparison to that of other, larger cities—such as Washington, D.C.—we still spend plenty of time pursuing individuals who break the law, disrupt the common peace and damage lives and property.

Since crime continues to escalate, law enforcement officials appreciate the help we receive from area businesses and citizens. Programs like "Neighborhood Watch" help to deter crime and stop it from happening. As you may know, these crime watch groups function strictly by the involvement and resources of local citizens and community organizations.

That is the key—local action at the local level. We know our community and its needs. We work with our citizens to educate them about the laws so that they will be in compliance with them.

While S. 1088 would establish education programs concerning smoking, I believe the additional programs that would be created by this bill are unnecessary. There are a number of ongoing programs conducted by our local health organizations and our schools. From the standpoint of the police department, we work with businesses within our community to ensure that they are in compliance with laws concerning tobacco products—particularly prohibiting sales to minors.

The state of Wisconsin has enacted laws to prohibit tobacco sales to minors and to limit their access to the product. For example, state law prohibits the placement of vending machines within 500 feet of a school. Additionally, the state requires retailers to post signs stating that it is unlawful to sell tobacco products to minors. This year, stores within Waunakee supplemented the requirements imposed by the state with a program entitled "It's the Law," which was made available by the tobacco industry.

"It's the Law" is meant to provide information about laws on sales to minors. Like neighborhood watch programs, it helps people—in this case kids and store clerks—to observe the law through heightened awareness.

The program includes decals for the doors, cash registers and display cases, buttons for employees to wear and a brochure that gives specific information about the state law and tips for checking identification. We feel it is a good approach to alerting both customers and sales clerks that this is the law in Wisconsin and must be obeyed.

While this program may not stop all sales to minors, it will certainly help in deterring kids from trying to buy cigarettes and, hopefully, not smoking. Programs such as this allow law enforcement officers to spend more time on serious crimes, since we know that something is being done to heighten the awareness of the laws governing tobacco sales.

While some of the goals of S. 1088 are certainly laudable, let's take a minute to look at the big picture. If you would ask your local police about the critical problems

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Americans, including kids, are facing today—they would likely name murder, burglary, rape, domestic violence, child abuse and so on. There is a great need for more training for police officers, counseling for victims and their families and rehabilitation for convicted criminals, not to mention improving the situations in our prisons, jails and detention centers.

It would suit me if not one more kid ever started smoking and no store clerk ever violated the law by selling cigarettes to minors.

But I'd be a lot happier knowing that our federal government was putting its limited resources into programs that would make a difference in our society by reducing crime and helping victims.

I long for the day when I can write to you and say that things out there are so placid that we could and should spend millions of taxpayer dollars on programs designed to reduce youth smoking. But I can't do that. There are too many immediate damaging and life threatening situations that I, the men and women who work for me, and my fellow police officers across the country face for me to support spending money for programs that duplicate ongoing efforts. We need to accept voluntary efforts—such as the "It's the Law" program—and those of our "neighborhood watch" groups, which provide a valuable contribution to upholding the law in our community.

The police force of Waunakee does its best to uphold the laws of the state of Wisconsin. However, our time as law enforcement officers doesn't allow us to focus on minor crimes that can be "self-policed" by area businesses. I support programs such as "It's the Law" that help to make both customers and store employees aware of the minimum age laws.

I encourage the Senate to focus its efforts on programs that will have a more vital impact in protecting the citizens of Wisconsin and this country.

Thank you very much.

PREPARED STATEMENT OF RAFAEL E. VEGA

I am writing to you today to voice my opposition to bill S. 1088 and to tell you about The Tobacco Institute's "It's the Law" program. As the largest tobacco wholesaler in Las Vegas, I believe this is a worthwhile program in which all retailers of tobacco products should become involved.

The Tobacco Product Education and Health Protection Act (S. 1088) would direct millions of dollars into programs that inform and educate the public about tobacco use. I am opposed to the bill, not on the merits of its intent, but because I believe that the bill would establish programs that duplicate ongoing activities and authorize the expenditure of funds on yet another "office" in Washington.

As an active member of the Hispanic Chamber of Commerce in Las Vegas, I am witness to many programs that are meant to assist businesses and the Hispanic community. Although the intent of many programs are worthwhile, it takes commitment by those directly involved to make them work.

This is exactly why the "It's the Law" program is a good one. it is being made available by the Tobacco Institute to all tobacco retailers at no charge. This program helps limit kids' access to cigarettes by helping the clerk behind the counter understand their responsibility for product sales.

As a businessman who observes the retail industry and has witnessed its explosive growth and the growing pains that have come with it, I appreciate programs that come from within the industry, since they are directed to the manner in which businesses are run. "It's the Law" is a good mechanism to educate retailers about state laws regarding tobacco sales.

When I started out in this business, many or my customers were people who owned their own stores and worked behind the counter themselves. They were familiar with the laws of their community and probably knew just about everyone who walked through the door.

But that is not the case today. Franchising has changed the face of the industry. Owners typically don't work in their stores, and must rely on a management network to oversee their employees. Since high turnover is common in the retail industry, employers are constantly hiring and training new employees.

The Tobacco Institute's "It's the Law" materials are helping to bring order to at least one aspect of employee training. The program brochure explains the minimum age for purchasing cigarettes and the penalties for violating the law. It also offers tips on how to verify the age of someone trying to purchase cigarettes, and what to do in confrontational situations.

And as a constant reminder to the retail clerk and the customer, signs for the store, stickers for the check-out counter and buttons for the employees are available.

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The message remains constant—"It's the Law! We Do Not Sell Tobacco Products to Persons Under 18."

Vega Wholesale is trying to do its part to see that our retail accounts comply with Nevada's laws on cigarette sales to underage youth. As a parent, I'd like to encourage other parents to talk to their children about this law, and why they should obey it. I hope that by working together we can succeed in encouraging our children to wait until they are adults before making—what we all know are—adult decisions.

I believe the "It's the Law" program is solid and sound, and has already proven to be effective. When private industry acknowledges a problem, looks for solutions and gives its program away—at no cost to taxpayers—I think that's positive leadership, and we need more of it.

Thank you.

PREPARED STATEMENT OF WES BALL

On behalf of the Tennessee Grocers Association, I urge the Subcommittee to reject S. 1088, "The Tobacco Product Education and Health Protection Act." The programs that would be established by this bill are similar to activities already in place. I am writing to tell you about the cooperative efforts that are being taken by the retail community and the tobacco industry to inform and educate our employees and customers about state minimum age laws pertaining to the sale of tobacco. These activities are part of an ongoing effort by the Tennessee Grocers Association in its program, "When To Make The Sale," run in conjunction with "It's The Law" to curb youth access to adult products.

Smoking is an adult decision. No one believes children should smoke. I think we all agree that retailers have a responsibility to their communities to do their part to ensure that children don't smoke. Tennessee's grocers recognized this responsibility and instituted a program called "When To Make The Sale" to educate merchants about tobacco and alcohol laws and how to enforce them. Last year, The Tobacco Institute launched a more expansive nationwide effort to address this issue as it relates to tobacco. Even though we already had a program, we saw the benefits of The Institute's "It's The Law" program. and I'm proud to say that we are a cosponsor.

Simply put, "It's The Law" educates retailers and their employees about state laws governing tobacco sales, and "When To Make The Sale" gives them the tools to educate their employees and customers about those laws. Through these programs, retailers, store clerks, parents, and children across the country are getting the message that state laws don't permit tobacco sales to minors.

Our association and other regional groups have undertaken to address youth access to tobacco products. However, prior to the introduction of "It's The Law," most retailers didn't have help in tackling the problem. In many cases, even the most well-intentioned businesses either weren't aware of the specifics of the law, weren't sure of the proper procedures to verify customer age, or weren't explaining the tobacco laws to their employees.

This national program gives every retailer in the country access to assistance in understanding and observing the law. My organization has distributed 35,000 "When To Make The Sale" materials to our 739 members. An order form for free "It's The Law" kits was distributed to our entire membership. These kits include descriptions of their state's laws regarding tobacco sales, tips on how to verify the age of customers, and support materials, including store signs, stickers, and lapel buttons. These materials are available—free of charge—to any retailer who sells cigarettes. That means various businesses across the country, such as gas stations, restaurants, convenience stores, grocery stores, and drug stores, cannot only become aware of the law, but also can take extra measures to educate their employees and customers.

In addition to providing educational and support materials, "It's The Law" focuses on employee training and acknowledgment. This component of the program is essential, because no matter how much material is distributed or how many signs are posted, unless sales clerks understand the laws and their responsibilities, these laws cannot be effective.

As this program grows and the use of program materials increases, visible uniformity against youth smoking develops. In some communities, the familiar blue and orange signs springing up in retail stores signal the message—loud and clear—"It's The Law: We Do Not Sell Tobacco Products to Persons Under 18." That's an important message, and every day more retailers are sending it.

Thank you.

["When To Make the Sale," provided by the Tennessee Grocers Association may be found in the committee files.]

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Senator FORD. Thank you, Mr. Whitley. Ms. Richards.

STATEMENT OF BRENDA RICHARDS, PRINCIPAL, SHAED ELEMENTARY SCHOOL, WASHINGTON, DC

Ms. RICHARDS. Good morning. My name is Brenda Richards. I am principal at Shaed Elementary School in Washington, DC, a position I have held for 4½ years. I have served as a teacher and administrator in the Washington, DC, school system for 21 years.

I am here today as an officer of the Family C.O.U.R.S.E. Consortium, an organization established for the with the support of the Tobacco Institute to discourage children from smoking. Although we receive an honorarium for serving on the consortium, I am not being paid to testify before you today. I am here because we believe the subcommittee should be aware of the good and important work of our organization.

As a member of the consortium, I am among educational professionals and organizations actively engaged in finding ways to discourage children from smoking. The consortium is 1 year old. But in the short time it has existed, I have been pleased by a number of things I would like to share with you today. First, the industry seems genuinely interested in using the techniques which we, as educators, believe will result in fewer children taking up smoking. The tobacco industry sought us out and has followed every recommendation that we, as a group, have made. And we know from experience that it is all too often futile to simply tell youngsters not to do something. We need to open the lines of communication in order to assist children in making wise decisions.

It is clear that children get much of their information and much of their motivation from other youngsters. But while they may not admit it, children truly do look for adults around them to help them make wise decisions.

The consortium's programs focus on the adults who are responsible for supervising and loving children every day; parents, grandparents, guardians, whoever might be the head of the household, as well as professionals, teachers and counselors, who deal with youngsters daily.

The problem is not that children need to be told about smoking. A recent survey reported that two-thirds of the high school students surveyed think smoking is as dangerous as using heroin, cocaine, or crack. The real problem as we see it is that despite these warnings, young people continue to succumb to peer pressure and smoke to impress their friends.

I have another observation that I would like to share with you. Shaed Elementary School, where I serve as principal, is in one of the most challenging neighborhoods here in Washington, DC. Not too long ago police officials announced that they had identified organized gangs, known as crews, operating in some of our neighborhoods. We have been dealing with these gangs for the past few years.

Every day on their way to and from school the boys and girls who attend our school walk by gang members, some with weapons. We have had drive-by shootings and murders within blocks of our schools. We have had a 10-year-old come to school with a loaded

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pistol. Many of our children, unfortunately, come from homes where one parent, at least one parent, is incarcerated.

We cannot imagine what sort of tragedies lie ahead for our children. I know that the police do the best they can and certainly so do we. I wish however, that all we had to worry about was whether those children smoke cigarettes. I wish I could see a lot more effort on the part of our city councils, State governments, and the Congress to help us on the problems that are killing our youngsters before they even get a chance to experience being an adult.

In the meantime, the Family C.O.U.R.S.E. Consortium, working with the tobacco industry, is aggressively and intelligently trying to discourage kids from smoking. Our work is directed at parents and other adults responsible for educating and nurturing children.

Helping to promote and distribute this booklet, "Tobacco, Helping Youth Say No," is our first venture. Ten prominent educators helped write and refine the booklet. I hope you will take the time to read it. If you do, you will see that it provides specific, realistic techniques for parents to communicate with their children.

As an educator, I appreciate the fact that this booklet manages to make practical, understandable use of ideas developed by social scientists over the years.

No matter how good it is, a booklet must find its way to the people who need it. Since its publication last year more than 175,000 copies have been distributed to American households, educators, clergy, therapists, juvenile justice officials, and civic leaders in every State and territory. This demand is in part in response to advertisements in major consumer magazines which reach millions of households. But it is also getting out through word of mouth and other more individual efforts to promote it.

With our support an upcoming issue of Classroom Connections will address the importance of self-esteem as parents and children face difficult decisions such as smoking.

We have had "Tobacco: Helping Youth Say No" translated into Spanish to reach parents who primarily communicate to their children in Spanish. And in connection with this effort, we recently asked Rafael Valdivieso of the Hispanic Policy Development Project to serve on the consortium. In the coming year, Mr. Valdivieso will head a consortium team to develop materials for Hispanic and Latino families.

While we placed an emphasis on printed materials since they are easy to distribute and share, we well know that people get much of the information by hearing others. With that in mind, we formed a speakers' bureau to reach out to parents, PTA's, business and civic groups, and further discuss family communication topics. We are now developing workshop presentation materials and identifying potential audiences.

By the joint efforts of many talented and concerned individuals and organizations brought together by the tobacco industry, we hope to make real progress in discouraging youngsters from smoking and improving family communication and parental involvement in the process. Thank you, and I would be happy to answer questions.

[The prepared statement of Ms. Richards follows:]

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PREPARED STATEMENT OF MRS. BRENDA RICHARDS

Mr. Chairman, my name is Brenda Richards. I am principal of the Shaed Elementary School in Washington, D.C., a position I have held for the past four and one-half years. I have served as a teacher and administrator in the Washington, D. C. school system for 21 years. I am a member of the Board of Trustees of Trinity College here in Washington and a parent as well as an educator.

I am here today as an officer of the Family C.O.U.R.S.E. Consortium, an organization established with the support of The Tobacco Institute to discourage children from smoking. Although we receive an honorarium for serving on the Consortium, I am not being paid to testify before you. I am here because we believe the Subcommittee should be aware of the good and important work of our organization.

As a member of the Consortium, I am among education professionals and organizations actively engaged in finding ways to discourage children from smoking. The Consortium is a year old. But in the short time it has existed, I have been pleased by a number of things I would like to share with you today.

First, the industry seems genuinely interested in using the techniques which we, as educators, believe will result in fewer children taking up smoking. The tobacco industry sought us out and has followed every recommendation that we, as a group, have made.

Let me summarize a few of the techniques we believe should be used to discourage children from smoking.

We know from experience that it is all too often futile to simply tell youngsters not to do something. We need to open the lines of communication in order to assist children in making wise choices.

Furthermore, basic values and skills are developed at a young age. The children in my elementary school are already at the point in their lives when they have made important choices.

It's clear that children get much of their information and most of their motivation from other youngsters. But while they may not admit it, children truly do look to adults around them for guidance.

Anyone having responsibility for children knows that it is very difficult to communicate effectively with a 10-year old, much less change his or her mind. Educating children is a full time job and it starts at home, continues in school, synagogue or church and ends in the home.

The Consortium's programs focus on the adults who are responsible for supervising and loving children everyday: parents, grandparents, guardians—whoever might be the head of the household—as well as professionals—teachers and counselors—who deal with youngsters daily.

Children hear again and again that smoking is harmful. That message comes from a variety of sources and is hammered home from preschool on. I often hear about children lecturing their parents about smoking. I am aware of one case where a little boy snatched a cigarette from his grandmother's mouth.

The problem is not that children need to be told about smoking. A recent survey reported that two-thirds of the high school students surveyed think smoking is as dangerous as using heroin, cocaine or crack. The real problem as we see it, is that despite these warnings, young people continue to succumb to peer pressure and smoke to impress their friends.

Mr. Chairman, Parents and other adults responsible for children want help to find the right words and the right times to speak to them. The Consortium's programs provide just that sort of help to begin a dialogue on important subjects. Personally, I believe that these same techniques will help parents discourage their children from experimenting with more that just tobacco.

I have another observation that I would Like to share with you today. Shaed Elementary School, where I serve as principal, is in one of the more challenging neighborhoods of Washington, D.C. Not too long ago, police officials announced that they had identified organized gangs—known as "crews"—operating in some neighborhoods. We have been dealing with crews for the past few years. Every day on their way to and from school, the boys and girls who attend Shaed Elementary walk by gang members—some with weapons. We have had drive-by shootings and murders within blocks of our school. We have had a 10-year old come to school with a loaded pistol. Many of our children come from homes where at least one parent is incarcerated.

Yes, I am saddened when I see a child with a cigarette in his or her mouth, and I do what I can to put a stop to it. But my priorities are, by necessity, elsewhere. Many of my students are hungry and sometimes scared by neighborhood violence.

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We can't even imagine what sort of tragedies lie ahead for them. I know that the police do the best they can and so do we. I wish all I had to worry about was whether they smoked cigarettes.

Mr. Chairman, we as a consortium support efforts to discourage children from smoking. In my opinion, advertising is certainly not the culprit. Kids are going to buy what they want and buy things that are never advertised. But I wish I could see a lot are effort on the part of city councils, state governments and the Congress to help us on the problems that are killing our kids before they even get a chance to experience being an adult.

In the meantime, the Family C.O.U.R.S.E. Consortium, working with the tobacco industry, is aggressively and intelligently trying to discourage kids from smoking. And, the techniques used to discourage smoking can go a long way toward addressing other issues. Our work is directed at parents and other adults responsible for educating and nurturing children.

Helping to promote and distribute this booklet (show copy) "Tobacco: Helping Youth Say No," is our first venture. Ten prominent educators helped write and refine the booklet. I hope you will take the time to read it. If you do, you will see that it provides specific, realistic techniques for parents to communicate with their children.

As an educator, I appreciate the fact that this booklet manages to make practical, understandable use of ideas developed by social scientists over the years.

No matter how good it is, a booklet must find its way to the people who need it. Since its publication late last year, more than 175,000 copies have been distributed to American households, educators, clergy, therapists, juvenile justice officials and civic leaders in every state and territory. This demand is in part in response to advertisements in major consumer magazines, which reach millions of households. But it is also getting out through word of mouth and other, more individual efforts, to promote it.

While the Consortium believes that the booklet speaks effectively to most of America's families, the members also feel that the Consortium could be more responsive to disadvantaged and minority segments of the population or single parent households. With that challenge, we have undertaken several projects to address the needs of those groups. I would like to share some of the highlights of those projects with you.

One of our members is Milton Bins, who represents the Council of the Great City Schools as deputy director. The Council was founded in 1961 and today represents 50 large, urban public school districts in 20 states, responsible for some 5.2 million students.

As you know, schools today must accommodate first-generation American children with backgrounds ranging from Cambodian and Colombian to Iranian, Korean, Russian and Mexican—in addition to the poor and minority urban populations they have served for decades. Our project with the Council seeks to help the parents of these children sort though the many complexities of American culture and contribute more to their youngsters' education and development.

With our support, the Council is establishing a resource center to help urban districts share the best existing approaches on problems as important as student health and family involvement. We also have supported a team of experts who have visited four cities—New York, New Orleans, Denver and Oklahoma City—to help public school staff assess and refine existing programs.

The Consortium's chairman is Sandee Boese, former president of the California State Board of Education. Ms. Boese currently publishes a magazine called "Classroom Connections," which serves as a textbook supplement and helps teachers deal with contemporary issues.

With our support, an upcoming issue of "Classroom Connections" will address the importance of self esteem as parents and children face difficult decisions such as smoking.

Youngsters with low self esteem—and many disadvantaged children have low self esteem—can make poor choices. The publication features examples of people who have overcome obstacles to succeed. The magazine will be distributed initially through social service agencies and education groups in Ms. Boese's home state of California with hope of national distribution.

We have had "Tobacco: Helping Youth Say No" translated into Spanish to reach parents who primarily communicate to their children in Spanish. And in connection with this effort, we recently asked Rafael Valdivieso of the Hispanic Policy Development Project to serve on the Consortium. In the coming year, Mr. Valdivieso will head a Consortium team to develop materials for Hispanic and Latino families.

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Another of our members, Mike Duda, a Presbyterian minister, runs two homes north of Boston for troubled teenagers. Rev. Duda is finding out how our materials work within his program and how they might be used by family therapists.

While we have placed an emphasis on printed materials since they are easy to distribute and share, we well know that people get much of their information by hearing others. With that in mind, we formed a speakers' bureau to reach out to parents, PTAs, business and civic groups and further discuss family communication topics.

We are developing workshop presentation materials and identifying potential audiences.

Mr. Chairman, not all of our projects are on a large scale. For example, over the summer I recruited students, parents, grandparents, older siblings, local college students and neighborhood artists to paint a mural at Shaed Elementary. The Consortium provided the paint and supplies. Those who participated provided the inspiration and talent. The result? A great mural of zoo animals for everyone to enjoy, teamwork and improved communication among children and adults. The title is "We Strive for Peace and Harmony."

We have much more under way. We are working with churches, individual schools and parents among others. Next year, we want to reach out more aggressively to the professional community, and see how all of our various tools work together in a community.

By the joint efforts of many talented and concerned individuals and organizations—brought together by the tobacco industry—we hope to make real progress in discouraging kids from smoking and improving family communication and parental involvement in the process. Thank you and I would be happy to answer questions.

Senator FORD. Thank you.

STATEMENT OF DR. LLOYD D. JOHNSTON, PROGRAM DIRECTOR AND RESEARCH SCIENTIST, INSTITUTE FOR SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN, ANN ARBOR, MI

Dr. JOHNSTON. Thank you Senator Ford, and members of the committee. I appreciate this opportunity to testify on the bill. I would like to comment on this bill from two perspectives. First, as a social scientist who has spent 20 years studying drug abuse of all kinds, including tobacco use, among America's young people. Second, as a member of the National Commission on Drug-Free Schools which recently issued its report to the President and the Congress.

As a social scientist I have directed the ongoing surveys of American high school and college students often referred to as the National High School Senior Survey. We have now completed some 17 national surveys and have come to the disturbing conclusion that levels of cigarette smoking among American youngsters began to stabilize nearly a decade ago and have not changed since.

Despite declines in use among adults as a result of more quitting smoking, despite enormous shifts in smoking in the population at large, despite the enactment of a host of laws and regulations and practices regarding smoking, and despite a downturn in the use of almost all illicit drugs and alcohol among young people, smoking rates among them have remained high and stable at about the same rate they were a decade ago.

The proportion of high school seniors who report current smoking is exactly the same in the class of 1990 as it was in the class of 1981, 29 percent. The proportion who are currently daily smokers in 1990 is down only 1 percentage point since 1981. Put succinctly, in recent years we have made very little or no progress toward reducing smoking rates among our young people and this, after all, represents the initiation rate for smoking, since nearly all use was initiated in this age range.

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Nearly one-third of our students are current smokers by their senior year, nearly one-fifth are daily smokers and many of the light current smokers will convert to heavy consumption rates in the year after high school. Based on the experiences of older cohorts, it is easy to project that hundreds of thousands of this year's graduating class will die prematurely of smoking-induced disease as a result of the smoking patterns and tobacco addictions so many of them have established as children and adolescents. After all, based on current smoking rates in the population, the Surgeon General estimates that nearly 500,000 Americans now die prematurely every year as a result of smoking.

We have no larger, more preventable or more unnecessary health problem in America today. I believe we attend so little to this problem for the simple reason that all of this carnage occurs with a 30- to 40-year timelag from the time when most smokers begin to smoke.

If the death and disease our youngsters are signing up for by beginning a smoking habit at these early ages were to occur within just a few years of their initiation, this issue would be viewed as a national emergency of the first order. It would make Chernobyl pale by comparison. However, the lengthy timelag has allowed us to treat is as less than the catastrophic phenomenon that it is, and to go about business as usual. As a parent, as a citizen, and as a scientist, I find this morally reprehensible. In this context, I find the measures proposed in the current bill to be absolutely minimal.

Now, putting on my hat as a member of the National Commission on drug-free schools, I can tell you that many of the specific provisions in the bill are consistent with the specific recommendations of that Commission.

In its year of hearings around the country, the Commission was impressed with the unanimity found among its hundreds of witnesses that cigarettes needed to be included in the Nation's drug prevention programs, partly because of the damage they wreak directly on the health and longevity of the user, partly because of the early age at which decisions leading to a lifetime of drug dependence on nicotine are made and encouraged, and partly because of the fact that cigarette smoking tends to precede and be very strongly associated with the use of the illicit drugs, something Congressman Synar has already alluded to.

In its final report, the Commission concluded that tobacco advertising has been so massive and so heavily aimed at youth that there was, at a minimum, a need for a substantial offsetting or corrective media campaign encouraging nonuse. This, I should add, was a compromise position. The majority—the great majority of the citizen members of the Commission—felt that tobacco advertising should be declared illegal altogether.

The National Information Program, as it is called in the present bill, is consistent with the thrust of this recommendation that there be a counteradvertising effort, though I would note that its scale, which is $50 million in the first year, absolutely pales in comparison to the multibillion dollar effort of advertising and promotion that the industry undertakes every year.

Certainly, the failure of American young people to reduce their smoking levels in the past decade speaks volumes to the need for

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our increase in such activities aimed at discouraging them from smoking. The success of the National Media-Advertising Partnership for a Drug-Free America in discouraging illegal drug use gives me reason for optimism about the potential of such a campaign as proposed here.

A number of the regulatory provisions in the bill are also highly consonant with the findings and recommendations of the Commission, in particular the one repealing the Federal preemption of State and local restrictions on tobacco advertising with regard to the location of stationary outdoor advertising and local transit advertising.

There is no practical way to prevent children from the youngest ages on from seeing these public placement advertising efforts, such as billboards, transit and bus signs, and point-of-purchase advertising. The proposal goes part way to allowing the State and local governments to take this into account in their regulations. I wish it had included point-of-purchase advertising as well.

The proposed new Surgeon General's warning in the bill—"Smoking is addictive. Once you start, you may not be able to stop."—is particularly salient for young people, and it was also specifically recommended by the Commission.

We find that most teenagers who are regular smokers believe they can quit and, further, believe that they will quit within 5 years. Sadly, when we follow them up, 5 or even 8 or 10 years later, the great majority of them are still smoking. It is essential that young people understand the dependence-producing nature of nicotine before they become dependent. Most of the seniors who smoke, by the way, tell us they have already tried to quit and have been unsuccessful.

In conclusion, as someone who looks at the drug-using behaviors of young people and frequently thinks of the tragedy of their early addictions and their foreshortened lives, I find this bill to be a very modest, though well-reasoned response to this national tragedy.

Thank you, Senator.

[The prepared statement of Dr. Johnston follows:]

PREPARED STATEMENT OF DR. LLOYD D. JOHNSTON

Mr. Chairman and members of the committee, I appreciate this opportunity to testify on the bill before you, the Tobacco Product and Health Education Act of 1991. I would like to comment on this bill from two perspectives: first as a social scientist who has spent twenty years studying all forms of drug abuse, including tobacco use, among American young people, and second, as a member of the National Commission on Drug-Free Schools, which recently issued its final report to the President and to Congress.

As a social scientist, I have directed the ongoing surveys of American high school and college students, often referred to as the National High School Senior Survey, since 1975. This series has been conducted by the University of Michigan's Institute for Social Research, where I am a Program Director, under a series of research grants from the National Institute on Drug Abuse. We have now completed some seventeen national surveys and have come to the disturbing conclusion that the levels of cigarette smoking among American youngsters began to stabilize nearly a decade ago; previously there had been a drop in use among student smokers of roughly one-quarter to one-third. Despite declines in use among adults as the result of increased quitting rates; despite the normative shifts against smoking in the population-at-large; despite the enactment of a host of restrictive laws, regulations, and practices regarding smoking; despite a downturn in the use of most illegal drugs as well as alcohol, today smoking rates among American young people remain stable and high—at about the same rate as they were a decade ago. The proportion of high

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school seniors who report current smoking (defined as any cigarette smoking in the past 30 days) was exactly the same in the class of 1990 at it was in the Class of 1981 (29.4 percent). The proportion who were current daily smokers in 1990 (at 19 percent) is down only one percentage point since 1981. Put succinctly, in recent years we have made little progress toward reducing smoking rates among our young people.

Nearly a third of our students are current smokers by senior year, nearly a fifth are current daily smokers, and many of the light current smokers will convert to heavier consumption rates in the first year after high school (Johnston, O'Malley, & Bachman, 1991). Further, the picture for the age cohort as a whole is even worse, since smoking rates are particularly high among high school dropouts, who are not covered in our surveys.

Based on the experiences of older cohorts, it is easy to project that hundreds of thousands of this year's graduating class will die prematurely of smoking induced disease as a result of the smoking patterns and tobacco addiction so many of them have established as children and adolescents. After all, based on current smoking rates in the population, the Surgeon General estimates that nearly 500,000 Americans die prematurely each year as a result of smoking. We have no larger or preventable or unnecessary health problem in America today. I believe we attend so little to the problem for the simple reason that all of this carnage occurs with a thirty-to forty-year time lag from the time most smokers begin to smoke. If the death and disease our youngsters are signing up for by beginning a smoking habit at these early ages were to occur within a few years, this issue would be viewed as a national emergency of the first order. It would make Chernobyl pale by comparison. However the lengthy time lag has allowed us to treat it as less than the catastrophic phenomenon that it is, and to go about business as usual. As a parent, as a citizen, and as a scientist, I find this morally intolerable. In this context, I find the measures proposed in the current bill to be minimal, considering the scale of the problem.

Putting on my hat as a member of the National Commission for Drug-Free Schools for a moment, I can tell you that many of the specific recommendations in the bill are consistent with the findings of that Commission. In its year of hearings around the country the Commission was impressed with the unanimity found among its hundreds of witnesses that cigarettes needed to be included in the nation's drug prevention programs, partly because of the damage they wreak directly on the health and longevity of the user, partly because of the early age at which decisions leading to a lifetime of drug dependence on nicotine are being made and encouraged, and partly because of the fact that cigarette smoking tends to precede and be very strongly associated with the use of the various illegal drugs. The role of cigarette smoking in involving young people in the use of illegal drugs is one which the Commission took very seriously.

In its final report entitled "Toward a Drug Free Generation: A Nation's Responsibility," the Commission concluded that tobacco advertising had been massive and heavily aimed at youth, and therefore, there was at a minimum a need for a substantial offsetting or corrective media campaign encouraging non-use. This, I should add, was a compromise position—the majority of the citizen members of the Commission felt that tobacco advertising should be declared illegal altogether, but were willing to support the lesser consensus position that a vigorous educational campaign to try to balance the messages sent by the industry to young people was justified. The "national information program" included in the present bill is consistent with the thrust of this recommendation, though I would note that its scale ($50 million dollars in the first year) pales in comparison to the industry's more than three billion dollars spent annually on advertising and promotion. Certainly the failure of American young people to reduce their smoking levels in the past decade speaks volumes to the need for our increase in activities aimed at discouraging their smoking.

The Commission also made a number of recommendations for consideration at the state and community levels for policies and programs which would help to discourage smoking among young people (see Part V of the Commission report). The feature of the bill calling for "Model State Leadership Incentive Grants" would be an excellent mechanism through which the Federal government can encourage and facilitate such initiatives.

Creating a Center for Tobacco and Health within CDC to carry out these programs certainly seems a minimal structural response—again the launching funds ($25 million) are very modest. The Commission had hoped that the public information campaign would be run by a non-governmental organization committed to discouraging smoking, so we had reservations about whether an agency inside of government would have the political freedom to conduct an appropriately vigorous campaign against tobacco use or whether they will be muted by the never ending lobby-

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ing by the tobacco industry. Nevertheless, I believe the effort should be tried and that safeguards to protect the Center from such untoward influence should be considered.

A number of the regulatory provisions in the bill are also highly consonant with the findings and recommendations of the Commission—in particular the one repealing the federal preemption of state and local restrictions on tobacco advertising with regard to the location of stationery outdoor advertising and local transit advertising. As I have indicated, the Commission felt that advertising plays a major role in encouraging young people to smoke and favored strong action to control, counter, or eliminate it. There is no practical way to prevent children from the youngest ages on from seeing public placement advertising such as billboards, transit and bus signs, and point of purchase advertising. This proposal goes part way toward allowing the state and local governments to take this into account in their regulations. I only wish it included point of purchase advertising displays, as well, since children are perpetually exposed to it in grocery stores, drug stores, convenience stores, etc.

The proposed new Surgeon General's warning label in the bill, "Smoking is addictive. Once you start, you may not be able to stop," is particularly salient for young people. We find that most teenagers who are regular smokers believe that they can quit, and further, believe that they will have quit within five years. Sadly, when we follow them up five years later, the great majority of them are still smoking. It is essential that young people understand the dependence-producing nature of nicotine before they become dependent. Many of the seniors who smoke, by the way, tell us that they have already tried to quit and have been unsuccessful.

With regard to the in-school education features of the bill, they are highly consistent with specific recommendations of the National Commission, including adding tobacco to the provisions of the Drug Free Schools and Communities Act of 1986. The members of the Commission came to believe strongly, as did the majority of those providing testimony to us, that a comprehensive drug free strategy for American young people has to include the legal drugs, which are generally illegal for children to buy and use. If concern about health consequences is one of the major deterrents to most forms of drug use—and my colleagues and I have marshalled considerable evidence to show that it is—how can we provide a credible message to youngsters in school about the health consequences of the illegal drugs while conveniently ignoring the most dependence-producing and most damaging one of all, nicotine? We are not being straight with these youngsters, and many of them realize and point out the hypocrisy, which undermines our credibility in the effort to prevent illicit drug use. At least as bad is the fact that many youngsters still are not getting the message on the dangers of cigarette use itself, with roughly a third of our graduating seniors (32 percent) saying that they do not see a great risk to the user of smoking one or more packs of cigarettes per day. Further, this statistic has declined only slightly since 1980 (when it was 36 percent).

While the schools are only one institution through which we socialize and educate our children, it is clear that they can and should do more to prevent tobacco use in this exceptionally vulnerable population. The provisions in the bill regarding in-school education help to move us in this direction.

In sum, as someone who looks at the drug using behaviors of young people and frequently thinks of the tragedy of their young addictions and foreshortened lives, I find this bill to be a very modest, though well directed, response to this national tragedy.

Mr. Chairman, I would request to submit into the record my written testimony, which contains a few relevant tables and charts from our most recent research monograph. Thank you.

The tables which follow are taken directly from Johnston, L.D., O'Malley, P.M., and Bachman, J.G. "Drug Use Among American High School Students and Young Adults, 1975–1990 (Vol I). Rockville, MD: National Institute on Drug Abuse, 1991.

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TABLE 12
Trends in Thirty-Day Prevalence of Various Types of Drugs

	Percent who used in last thirty days																
	Class of 1975	Class of 1976	Class of 1977	Class of 1978	Class of 1979	Class of 1980	Class of 1981	Class of 1982	Class of 1983	Class of 1984	Class of 1985	Class of 1986	Class of 1987	Class of 1988	Class of 1989	Class of 1990	'89–'90 change
Approx. N =	9400	15400	17100	17000	15500	15000	17500	17700	16300	15900	16000	15300	16300	16300	16700	15200	
Any Illicit Drug Use[a]	*30.7*	*34.2*	*37.6*	*36.9*	*36.9*	*37.3*	*36.9*	*33.5*	*32.4*	—	—	—	—	—	—	—	
Adjusted Version[b]	—	—	—	—	—	—	—	*33.5*	*30.5*	29.2	29.7	27.1	*24.7*	*21.3*	*19.7*	*17.2*	*−2.5sss*
Any Illicit Drug Other Than Marijuana[c]	*15.4*	*13.9*	*16.2*	*15.1*	*16.8*	*18.4*	*21.7*	*19.2*	*18.4*	—	—	—	—	—	—	—	
Adjusted Version[b]	—	—	—	—	—	—	—	*17.9*	*15.4*	*15.1*	*14.9*	*13.2*	*11.6*	*10.0*	*9.1*	*8.0*	*−1.1s*
Marijuana/Hashish	27.1	32.2	36.4	37.1	36.5	33.7	31.6	28.5	27.0	25.2	25.7	23.4	21.0	18.9	16.7	14.9	−2.7sss
Inhalants[d]	NA	0.9	1.3	1.5	1.7	1.4	1.5	1.5	1.7	1.9	2.3	2.5	2.8	2.9	2.3	2.7	+0.4
Inhalants Adjusted[e]	*NA*	*NA*	*NA*	*NA*	*3.2*	*2.7*	*2.5*	*2.5*	*2.5*	*2.6*	*3.0*	*3.2*	*3.5*	*3.0*	*2.7*	*2.9*	*+0.2*
Amyl/Butyl Nitrites[f,g]	NA	NA	NA	NA	2.4	1.8	1.4	1.1	1.4	1.4	1.8	1.3	1.3	0.8	0.8	0.8	0.0
Hallucinogens	4.7	3.4	4.1	3.9	4.0	3.7	3.7	3.4	2.8	2.6	2.5	2.5	2.5	2.2	2.2	2.2	0.0
Hallucinogens Adjusted[h]	*NA*	*NA*	*NA*	*NA*	*5.2*	*4.4*	*4.5*	*4.1*	*3.5*	*3.2*	*3.5*	*3.5*	*3.8*	*3.3*	*2.9*	*2.3*	*−0.6*
LSD[f,g]	2.3	1.9	2.1	2.1	2.4	2.3	2.5	2.4	1.9	1.5	1.6	1.7	1.9	1.9	1.9	1.9	+0.1
PCP[f,g]	NA	NA	NA	NA	2.4	1.4	1.4	1.0	1.3	1.0	1.0	1.3	0.8	0.3	1.4	0.4	−1.0sss
Cocaine	1.0	2.0	2.9	3.9	5.7	5.2	5.0	5.0	4.0	5.0	6.7	6.2	4.3	3.4	2.8	1.9	−0.9sss
"Crack"[i]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	1.3	1.6	1.4	0.7	−0.7sss
Other cocaine[j]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	4.1	3.2	1.8	1.7	−0.2
Heroin	0.4	0.2	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.3	0.3	0.2	0.2	0.2	0.3	0.2	−0.1
Other opiates[k]	2.1	2.0	2.0	2.1	2.4	2.4	2.1	1.8	1.8	1.8	2.3	2.0	1.8	1.8	1.8	1.6	−0.1
Stimulants[k]	8.5	7.7	8.0	8.7	9.9	12.1	15.8	13.7	12.4	NA	NA	NA	NA	NA	NA	NA	NA
Stimulants Adjusted[k,l]	*NA*	*NA*	*NA*	*NA*	*NA*	*NA*	*NA*	*10.7*	*8.9*	*8.3*	*6.8*	*5.5*	*5.2*	*4.6*	*4.2*	*3.7*	*−0.5*
Crystal Methamphetamine[j]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.6	NA
Sedatives[k,m]	5.4	4.5	5.1	4.2	4.4	4.0	4.0	3.4	3.0	2.3	2.4	2.2	1.7	1.4	1.6	1.4	−0.2
Barbiturates[k]	4.7	3.9	4.3	3.2	3.2	2.9	2.8	2.8	2.1	1.7	2.0	1.8	1.4	1.2	1.4	1.3	−0.1
Methaqualone[k,m]	2.1	1.6	2.3	1.9	2.3	3.3	3.1	2.4	1.6	1.1	1.0	0.6	0.6	0.5	0.6	0.2	−0.4s
Tranquilizers[k]	4.1	4.6	4.9	3.4	3.7	3.1	2.7	2.4	2.5	2.1	2.1	2.1	2.0	1.5	1.3	1.2	−0.1
Alcohol	68.2	68.3	71.2	72.1	71.8	72.0	70.7	69.7	69.4	67.2	65.8	66.3	66.4	63.9	60.9	57.1	−3.9s
Cigarettes	36.7	38.8	38.4	36.7	34.4	30.5	29.4	30.0	30.3	29.3	30.1	29.8	29.4	28.7	28.6	29.4	+0.8
Steroids[f]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.8	1.0	+0.2

NOTES: Level of significance of difference between the two most recent classes: s = .05, ss = .01, sss = .001. NA indicates data not available.

[a] Use of "any illicit drugs" includes any use of marijuana, hallucinogens, cocaine, and heroin, or any use of other opiates, stimulants, barbiturates, methaqualone (excluded in 1990), or tranquilizers not under a doctor's orders.

[b] Based on the data from the revised question, which attempts to exclude the inappropriate reporting of non-prescription stimulants.

[c] Use of "other illicit drugs" includes any use of hallucinogens, cocaine, and heroin, or any use of other opiates, stimulants, barbiturates, methaqualone (excluded in 1990), or tranquilizers not under a doctor's orders.

[d] Data based on four questionnaire forms in 1976–1988; N is four-fifths of N indicated. Data based on five questionnaire forms in 1989–1990; N is five-sixths of N indicated.

[e] Adjusted for underreporting of amyl and butyl nitrites. See text for details.

[f] Data based on a single questionnaire form; N is one-fifth of N indicated in 1979–1988 and one-sixth of N indicated in 1989 and 1990.

[g] Question text changed slightly in 1987.

[h] Adjusted for underreporting of PCP. See text for details.

[i] Data based on two questionnaire forms in 1987–1989; N is two-fifths of N indicated in 1987–1988 and two-sixths of N indicated in 1989. Data based on six questionnaire forms in 1990.

[j] Data based on a single questionnaire form in 1987–1989; N is one-fifth of N indicated in 1987–1988 and one-sixth of N indicated in 1989. Data based on four questionnaire forms in 1990; N is four-sixths of N indicated.

[k] Only drug use which was not under a doctor's orders is included here.

[l] Data based on two questionnaire forms; N is two-sixths of N indicated.

[m] Data based on five questionnaire forms in 1975–1989, six questionnaire forms in 1990, and one questionnaire form in 1990. N is one-sixth of N indicated in 1990.

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TABLE 13
Trends in Thirty-Day Prevalence of Daily Use of Various Types of Drugs

	Percent who used daily in last thirty days															
	Class of 1975	Class of 1976	Class of 1977	Class of 1978	Class of 1979	Class of 1980	Class of 1981	Class of 1982	Class of 1983	Class of 1984	Class of 1985	Class of 1986	Class of 1987	Class of 1988	Class of 1989	Class of 1990	'89 - '90 change
Approx. N =	9400	15400	17100	17800	15500	15900	17500	17700	16300	15900	16800	15200	16300	16300	16700	15200	
Marijuana/Hashish	9.0	8.2	9.1	10.7	10.3	9.1	7.0	6.3	5.5	5.0	4.9	4.0	3.3	2.7	2.8	2.2	-0.7a
Inhalants[a]	NA	0.0	0.0	0.1	0.0	0.1	0.1	0.1	0.1	0.1	0.2	0.2	0.1	0.2	0.2	0.3	0.0
Inhalants Adjusted[b]	*NA*	*NA*	*NA*	*NA*	*0.1*	*0.2*	*0.2*	*0.2*	*0.2*	*0.2*	*0.4*	*0.4*	*0.4*	*0.3*	*0.3*	*0.3*	*0.0*
Amyl & Butyl Nitrites[c,d]	NA	NA	NA	NA	0.0	0.1	0.1	0.0	0.2	0.1	0.3	0.5	0.3	0.1	0.3	0.1	-0.2
Hallucinogens	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.0	0.1	0.1	0.0
Hallucinogens Adjusted[b]	*NA*	*NA*	*NA*	*NA*	*0.2*	*0.2*	*0.1*	*0.2*	*0.2*	*0.2*	*0.3*	*0.3*	*0.2*	*0.0*	*0.3*	*0.3*	*0.0*
LSD	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.1	0.1	0.1	0.0	0.1	0.0	0.0	0.1	0.0
PCP[c,d]	NA	NA	NA	NA	0.1	0.1	0.1	0.1	0.1	0.1	0.3	0.2	0.3	0.1	0.2	0.1	-0.1
Cocaine	0.1	0.1	0.1	0.1	0.2	0.2	0.3	0.2	0.2	0.2	0.4	0.4	0.3	0.2	0.3	0.1	-0.2a
"Crack"[e]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.1	0.1	0.2	0.1	-0.2a
Other cocaine[e]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.2	0.2	0.1	0.1	0.0
Heroin	0.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.0
Other opiates[b]	0.1	0.1	0.2	0.1	0.0	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.2	0.1	-0.1
Stimulants[b]	0.5	0.4	0.5	0.5	0.5	0.7	1.2	1.1	1.1	NA	NA	NA	NA	NA	NA	NA	NA
Stimulants Adjusted[b,i]	*NA*	*NA*	*NA*	*NA*	*NA*	*NA*	*NA*	*0.7*	*0.8*	*0.6*	*0.4*	*0.3*	*0.3*	*0.3*	*0.3*	*0.2*	*-0.1*
Crystal Methamphetamine[j]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.1	NA
Sedatives[b,k]	0.3	0.2	0.2	0.2	0.1	0.2	0.2	0.2	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.0
Barbiturates[b]	0.1	0.1	0.2	0.1	0.0	0.1	0.1	0.1	0.1	0.0	0.1	0.1	0.1	0.0	0.1	0.1	0.0
Methaqualone[b,k]	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.1	0.0	0.0	0.0	0.0	0.0	0.1	0.0	0.0	0.0
Tranquilizers[b]	0.1	0.2	0.3	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.0	0.0	0.1	0.0	0.1	0.1	0.0
Alcohol																	
Daily	5.7	5.6	6.1	5.7	6.9	6.0	6.0	5.7	5.5	4.6	5.0	4.6	4.6	4.2	4.2	3.7	-0.5
5+ drinks in a row/ last 2 weeks	36.8	37.1	39.4	40.3	41.2	41.3	41.4	40.5	40.6	38.7	38.7	36.8	37.5	34.7	33.0	32.2	-0.8
Cigarettes																	
Daily	29.9	28.8	28.8	27.5	25.4	21.3	20.3	21.1	21.2	19.7	19.5	18.7	18.7	18.1	18.9	19.1	+0.2
Half-pack or more per day	17.9	19.2	19.4	18.8	18.5	14.3	13.5	14.2	13.8	12.3	12.5	11.4	11.4	10.6	11.2	11.3	+0.1
Steroids[c]	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	0.1	0.2	+0.1

NOTES: Level of significance of difference between the two most recent classes: $\alpha = .05$, $\alpha\alpha = .01$, $\alpha\alpha\alpha = .001$. NA indicates data not available. Any apparent inconsistency between the change estimate and the prevalence estimates for the two most recent classes is due to rounding error.

[a] Data based on four questionnaire forms in 1976–1988; N is four-fifths of N indicated. Data based on five questionnaire forms in 1989–1990; N is five-sixths of N indicated.

[b] Adjusted for underreporting of amyl and butyl nitrites. See text for details.

[c] Data based on a single questionnaire form; N is one-fifth of N indicated in 1979–1988 and one-sixth of N indicated in 1989 and 1990.

[d] Question text changed slightly in 1987.

[e] Adjusted for underreporting of PCP. See text for details.

[f] Data based on two questionnaire forms in 1987–1989; N is two-fifths of N indicated in 1987–1988 and two-sixths of N indicated in 1989. Data based on six questionnaire forms in 1990.

[g] Data were based on a single questionnaire form in 1987–1989; N is one-fifth of N indicated in 1987–1988 and one-sixth of N indicated in 1989. Data based on four questionnaire forms in 1990; N is four-sixths of N indicated.

[h] Only drug use which was not under a doctor's orders is included here.

[i] Based on the data from the revised question, which attempts to exclude the inappropriate reporting of non-prescription stimulants.

[j] Data based on two questionnaire forms; N is two-sixths of N indicated.

[k] Data based on five questionnaire forms in 1975–1988, six questionnaire forms in 1989, and on a single questionnaire form in 1990; N is one-sixth of N indicated in 1990

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	Percent who did not use in last twelve months															
	Class of 1975	Class of 1976	Class of 1977	Class of 1978	Class of 1979	Class of 1980	Class of 1981	Class of 1982	Class of 1983	Class of 1984	Class of 1985	Class of 1986	Class of 1987	Class of 1988	Class of 1989	Class of 1990
Marijuana/Hashish	15.4	15.7	15.6	15.2	15.9	19.1	22.5	24.5	25.8	27.1	25.1	23.8	27.7	29.9	32.3	33.7
Inhalants	NA	70.9	66.7	65.8	57.5	61.3	66.7	64.8	68.4	64.6	63.0	61.6	59.4	61.1	66.5	61.7
Adjusted	NA	NA	NA	NA	50.8	55.7	65.5	63.3	64.4	58.4	59.8	55.7	56.5	59.4	62.9	59.5
Nitrites	NA	NA	NA	NA	41.4	48.6	63.4	63.3	57.1	50.6	49.4	45.3	44.7	46.9	48.5	33.3
Hallucinogens	31.3	37.7	36.7	32.9	29.8	30.1	32.3	35.2	38.7	39.3	38.8	38.1	37.9	38.2	40.4	37.2
Adjusted	NA	NA	NA	NA	31.2	32.5	35.7	38.0	36.7	40.6	36.9	36.1	36.8	37.0	37.4	38.1
LSD	36.3	41.8	43.9	35.1	30.5	30.1	33.7	36.5	39.3	41.3	41.3	37.5	38.1	37.7	41.0	37.9
PCP	NA	NA	NA	NA	45.3	54.2	59.0	63.3	53.6	54.0	40.8	50.0	56.7	58.6	38.5	57.1
Cocaine	37.8	38.1	33.3	30.2	22.1	21.7	24.8	28.1	29.6	28.0	24.3	24.9	32.2	34.7	36.9	43.6
"Crack"	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	27.8	35.4	34.0	45.7
Heroin	54.5	55.6	55.6	50.0	54.5	54.5	54.5	50.0	50.0	61.5	50.0	54.5	58.3	54.5	53.8	61.5
Other Opiates	36.7	40.6	37.9	39.4	38.6	35.7	41.6	44.8	45.7	46.4	42.2	42.2	42.4	46.5	47.0	45.8
Stimulants	27.4	30.1	29.1	25.3	24.4	21.2	19.3	26.7	30.5	NA	NA	NA	NA	NA	NA	NA
Adjusted	NA	NA	NA	NA	NA	NA	NA	27.2	33.5	36.8	39.7	42.7	43.5	44.9	43.5	48.0
Sedatives	35.7	39.5	37.9	38.1	32.2	30.9	34.4	40.1	45.1	50.4	50.8	50.0	52.9	52.6	50.0	NA
Barbiturates	36.7	40.7	40.4	40.9	36.4	38.2	41.6	46.6	47.5	50.5	50.0	50.0	51.4	52.2	49.2	50.0
Methaqualone	37.0	39.7	38.8	38.0	28.9	24.2	28.3	36.4	46.5	54.2	58.2	59.6	62.5	60.6	51.9	69.6
Tranquilizers	37.6	38.7	40.0	41.8	41.1	42.8	45.6	50.0	48.1	50.8	48.7	46.8	49.5	48.9	50.0	51.4
Alcohol	6.2	6.7	5.9	5.8	5.3	5.7	6.0	6.5	5.7	7.1	7.2	7.4	7.0	7.3	8.8	9.9
Cigarettes[a]	16.0	16.7	16.2	17.9	19.6	21.4	20.8	19.1	18.6	18.5	15.9	17.0	17.1	18.2	18.5	18.2

[a]Percentage of regular smokers (ever) who did not smoke at all in the last thirty days.

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TABLE 17

Incidence of Use for Various Types of Drugs, by Grade
Class of 1990

(Entries are percentages)

Grade in which drug was first used:	Marijuana	Inhalants[a]	Amyl/Butyl Nitrites	Hallucinogens[a]	LSD	PCP	Cocaine	Heroin	Other Opiates	Stimulants[b] (adjusted)	Barbiturates	Methaqualone	Tranquilizers	Alcohol	Getting Drunk	Cigarettes	Cigarettes (daily)
6th	2.8	2.8	0.1	0.2	0.2	0.1	0.2	0.0	0.5	0.9	0.2	0.1	0.3	10.8	4.2	18.7	1.6
7-8th	10.1	6.3	0.2	0.9	0.9	0.3	1.1	0.3	1.2	3.8	2.0	0.7	1.4	26.9	17.0	22.2	5.9
9th	9.4	2.7	0.5	2.1	1.8	0.6	1.5	0.3	1.4	4.0	1.3	0.5	1.2	22.3	18.4	9.9	4.9
10th	8.6	2.1	0.6	2.3	2.1	0.8	2.3	0.3	2.1	3.5	1.5	0.4	1.4	15.4	13.8	6.5	4.1
11th	6.2	2.3	0.2	2.2	2.2	0.5	2.9	0.2	1.9	3.1	1.1	0.3	1.7	9.5	9.5	4.7	3.9
12th	3.6	1.9	0.4	1.6	1.4	0.4	1.3	0.2	1.2	2.2	0.7	0.3	1.2	4.5	5.4	2.3	1.7
Never used	59.3	82.0	97.9	90.6	91.3	97.2	90.6	98.7	91.7	82.5	93.2	97.7	92.8	10.5	31.7	35.6	78.0

NOTE: Percents are based on three of the six forms (N = approximately 6900) except for cocaine which is based on four of the six forms (N = approximately 9200), inhalants which is based on two of the six forms (N = approximately 4600), and PCP and nitrites which are based on one of the six forms (N = approximately 2300).

[a] Unadjusted for known underreporting of certain drugs. See text for details.

[b] Based on the data from the revised question, which attempts to exclude the inappropriate reporting of non-prescription stimulants.

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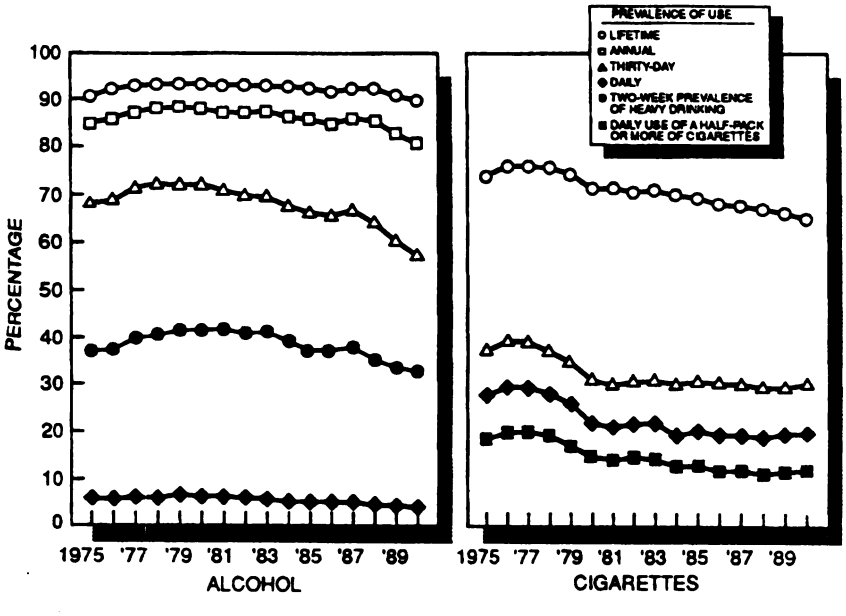
FIGURE 9F.—TRENDS IN LIFETIME, ANNUAL, AND THIRTY-DAY PREVALENCE OF VARIOUS DRUGS (ALL SENIORS)



Senator FORD. Thank you very much. Mr. Bell.

STATEMENT OF DAVID BELL, PRESIDENT, BOZELL, INC.

Mr. BELL. Thank you, Mr. Chairman. My name is David Bell. I am the president of Bozell, Inc., the 14th largest advertising agency in the United States. My agency is a member of the American Association of Advertising Agencies, and I am the immediate past chairman of the American Advertising Federation.

Today, I testify on behalf of the Freedom to Advertise Coalition, which includes those two organizations as well as the Magazine Publishers of America, the Association of National Advertisers, the Point of Purchase Advertising Institute, and the Outdoor Advertising Association of America.

Incidentally, Senator, I was with 135 AAF advertising professionals in Lexington, KY, who send not only their greetings but their support for this committee holding these hearings.

Senator FORD. That is a message from heaven. [Laughter.]

Mr. BELL. As I will describe later, S. 1088 has a specific impact on the outdoor advertising industry. I ask permission to submit for the record a written statement of the Outdoor Advertising Association of America that describes that industry's voluntary efforts to remove advertisements of all products illegal for sale to minors which are either intended to be read from or which are situated within 500 feet of established places of worship, schools, or hospitals.

Senator FORD. Without objection, that statement will be included in the record in full.

Mr. BELL. I would like to describe the specific impact S. 1088 would have on advertising rights, and I would like to describe the

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way advertising of mature products works, but first I feel compelled to share a sense of personal frustration.

Bozell does not have any tobacco accounts, so I do not appear here as a representative of the tobacco industry, but I am here as an advertising leader who is tired of hearing that the information that advertising produces causes all of society's woes.

There are more than 60 bills pending in Congress which would restrict advertising rights in some way. Senator Kennedy wants to ban tobacco ads, Senator Thurmond and Congressman Joe Kennedy want to further restrict truthful alcohol ads, Congressman Moakley's bill would restrict truthful health claims in food ads, and Congressman Sikorski and Senator Lautenberg think truthful environmental claims must be restricted.

To be sure, each of these Members each have noble goals. They enjoy the support of interest groups like those here today who believe that proposals will help solve unique societal problems. Because their issue is unique, they argue that advertising restrictions just this once will do no irreparable damage to the first amendment protection of commercial free speech.

Unfortunately, they ignore two fundamental problems. The first is that censorship is addictive. It is not just this once. Once you start, censorship is easy to continue and nearly impossible to stop.

The second is the cause. The proponents simply ignore cause, and the fact that the vast body of evidence demonstrates that advertising restrictions will not solve the problems they seek to address.

S. 1088 contains two specific threats to advertising. First, section 2758 would repeal Federal preemption of State or local regulation of tobacco advertising on billboard or transit vehicles. This provision would encourage States and literally thousands of counties, cities, and local municipalities to restrict truthful tobacco advertising.

Frankly, 2758 is an exercise in double discrimination. The language purports to regulate advertising because of its content, and as Professor Neuborne will testify, laws which infringe speech because of its content risk violation of the first amendment. Also, 2758 singles out billboard and transit media, and that kind of targeted censorship is still censorship and still unacceptable.

Second, section 2757 would amend the Federal Cigarette Labeling and Advertising Act to eliminate preemption of State common law claims based on the specious charge that the current federally mandated health warnings in cigarette advertisements are inadequate.

I am not a lawyer, but it appears clear that 2757 would permit State courts and juries across the country to decide that existing health warnings fail to warn consumers. If so, hundreds of different courts could hamstring manufacturers by requiring their own individual advertising warnings. The resulting patchwork of nonuniform warning requirements would create a de facto ban on all national advertising of legal tobacco products.

The result: We would certainly expect to see reduced brand competition, but we would not expect reduced consumption. Tobacco is a mature product category. It is mature because of the extraordinarily high consumer awareness. Because of that awareness, ad-

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vertising in the category is designed to, and has the effect of, either maintaining market share or seizing it from a competitor.

Perhaps to bring it closer to home, tobacco advertising is not unlike political advertising. Fewer people smoke, and unfortunately fewer people vote, despite the fact that advertising expenditures for both categories has risen.

When the Senators running for reelection design their advertising for next year's election, the message will seek to convince voters who vote to vote for them. In the same way that no Senator can spend to reach category nonvoters, no tobacco company can spend to reach category nonusers, and in the same way that Senators will not spend to reach underage voters, tobacco companies do not spend to reach underage consumers, and the same holds true for other mature or declining product categories, including heavily advertised ones like soap, toothpaste, diapers, auto tires, and cosmetics.

In closing, Mr. Chairman, the Freedom to Advertise Coalition is pleased that this committee is exercising its jurisdiction in this hearing today, and we trust that the members of this committee understand that restricting advertising will not solve tobacco and health issues and that they pose serious threats to the marketing of legal products to qualified consumers under the Constitution itself.

Thank you.

[The prepared statements of Mr. Bell and the Outdoor Advertising Association of America follow:]

PREPARED STATEMENT OF DAVID BELL

Thank you, Mr. Chairman. My name is David Bell. I am the President of Bozell, Inc., the 14th largest U.S. advertising agency. My agency is a member of the American Association of Advertising Agencies and I am the immediate past Chairman of the American Advertising Federation. Today I testify on behalf of the Freedom to Advertise Coalition, which includes the two associations just referenced, as well as the Magazine Publishers of America, the Association of National Advertisers, the Point of Purchase Advertising Institute, and the Outdoor Advertising Association of America.

As I will describe later in my testimony, S. 1088 has a specific impact on the outdoor advertising industry. I ask permission to submit for the record a written statement of the Outdoor Advertising Association of America which describes that industry's voluntary efforts to remove advertisements of all products illegal for sale to minors which are either intended to be read from, or situated within 500 feet of places of worship, schools and hospitals.

I would like to describe the specific impact S. 1088 will have on advertising rights, and I would like to describe the way advertising of mature products works. But first I feel compelled to share a sense of personal frustration.

Bozell currently does not have any tobacco accounts. So I do not appear here as a representative of the tobacco industry. But I am here as an advertising professional who is tired of hearing that advertising causes all of society's woes.

There are more than 60 bills pending in Congress which would restrict advertising rights in some way. Senator Kennedy wants to ban tobacco ads. Senator Thurmond and Congressman Joe Kennedy want to further restrict truthful alcohol ads. Congressman Moakley's bill could restrict truthful health claims in food ads. And Congressman Sikorski and Senator Lautenberg think truthful environmental claims must be restricted.

These members and others each have noble goals. They enjoy the support of interest groups, like those represented here today, who believe the proposals will help solve a unique consumer crisis. Because their issue is unique, they argue that advertising restrictions—just this once—will do no irreparable damage to the First Amendment protection of commercial free speech. Unfortunately, they ignore two fundamental problems. First, a vast body of evidence demonstrates that advertising

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restrictions simply will not solve she problems their proponents seek to address. Second, censorship is addictive. Once you start, you may not be able to stop.

S. 1088 contains two serious threats to advertising. First, Section 2758 would repeal existing preemption of state or local regulation of tobacco advertising on billboards or transit vehicles. This provision would encourage states and literally thousands of counties, cities and other local municipalities to restrict truthful tobacco advertising.

Section 2758 constitutes an exercise in double discrimination. The language purports to regulate advertising because of its content—tobacco product promotion. As Professor Neuborne has testified, laws which infringe speech because of its content risk violation of the First Amendment. Second, Section 2758 singles out billboard and transit media for disparate treatment. Censorship is no less unacceptable just because it is targeted.

The second threat to advertising rights is contained in Section 2757. That section would amend the Federal Cigarette Labeling and Advertising Act to eliminate preemption of state common law claims based on the alleged inadequacy of the federally mandated health warnings in cigarette advertisements.

Now I am not a lawyer, but it appears clear to me chat Section 2757 would permit state courts and juries across the country to decide that the existing federally mandated health warnings fail to warn consumers sufficiently. If so, myriad courts could require manufacturers to include different warnings in their advertisements. The resulting multiplicity of non-uniform warning requirements could create a de facto ban on all national advertising of tobacco products.

What will be the result of these advertising restrictions? Perhaps reduced brand competition, but not reduced consumption. Advertisers of tobacco products operate in a "mature" product market. Mature products possess high consumer awareness of the existence of the product category. In such a market, advertising is designed and has the effect of building and maintaining market share.

Instructive similarities exist between the marketing of tobacco products and politicians. Advertisers for both products operate in a flat or declining market—fewer people smoke and, unfortunately, fewer people vote, despite the fact that advertising expenditures for both are rising. Wthen Senators Hollings, Ford, McCain, Kasten and others design their spots for next year's election, the message will seek to ensure that the voters who vote, vote for you, not that more people should vote. The same holds true for tobacco or any other mature product category, including heavily advertised products like soap, razor blades, diapers, automobiles and cosmetics. It is inefficient to spend advertising dollars to increase the overall size of a market as opposed to building a focused market share.

In closing, Mr. Chairman, the Freedom to Advertise Coalition is pleased that the Senate Commerce Committee, which exercises proper jurisdiction over advertising and commerce issues, has convened this hearing today. We trust that the members of this committee understand that advertising restrictions will not solve the tobacco and health issue, and that such restrictions pose serious risks to the marketing of legal products to qualified consumers, and to the Constitution. Thank you for the opportunity to testify.

PREPARED STATEMENT OF THE OUTDOOR ADVERTISING ASSOCIATION OF AMERICA

Mr. Chairman, I am Ruth Segal, Executive Vice President of the Outdoor Advertising Association of America. The Association represents approximately 150 standardized billboard companies which own approximately 80 percent of the standardized billboards in the United States.

The OAAA opposes Section 2758 of S. 1088 which would repeal the federal preemption of state and local regulation of tobacco advertising with respect to billboards and transit advertising. This provision is designed to encourage the establishment of a crazy-quilt of regulations on the state and local level and is simply an attempt to impose a de facto ban on cigarette advertising on billboards and transit.

In his testimony before this Committee, Professor Neuborne has explained that such measures constitute a clear infringement upon First Amendment rights. On a practical level, it is insupportable to suggest that a ban on outdoor and transit advertising would have an appreciable impact on cigarette consumption. Much has been made in the testimony supporting this measure that billboards should be singled out for a selective media ban. But no one can believe that a selective media ban on billboard advertising would change cigarette consumption.

Billboard and transit advertising may seem a convenient first target for those who support the total prohibition of protected speech regarding these lawful products.

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But in reality, Section 2757 simply diverts state and local resources and energy from concrete public education programs which do contribute to informed choice by consumers in this and other areas.

The outdoor advertising industry has already unilaterally withdrawn thousands of billboards from use in the dissemination of cigarette and tobacco advertising. In 1990, the OAAA adopted a Code of Practices which established exclusionary zones precluding tobacco and alcoholic beverage advertising within 500 feet of schools, places of worship and hospitals.

To date, more than 20,000 billboards have been voluntarily withdrawn for use in the dissemination of messages for these products. In addition, OAAA has adopted the international children's symbol to identify billboards that are "off-limits" to any adult product or service. The decals contribute to the effectiveness of this program by serving to alert both community members and industry billposters that these signs are in exclusionary zones. If a citizen or a local watchdog group sees an adult ad in the wrong area, they can alert the billboard company, whose name is always on the structure. They can also call the company if a decal is not posted in the appropriate area.

There has been broad public acceptance for this program. Self regulation is working in our advertising medium and our members believe in this program.

As an example, within two months after its adoption, two of our largest members, Gannett Outdoor Group and Patrick Media Group, had tagged approximately 9,000 billboard faces in 41 markets. Smaller companies have reported compliance as well. Lamar Advertising, which operates in many medium sized markets in the Southeast has placed decals on over 1,800 billboard faces and also reports 100 percent compliance.

Mr. Chairman, we believe that we are off to a good start, and we intend to effectively monitor this program and continue to contribute to its voluntary implementation.

At the beginning of this school year, I sent out a letter to all our companies reminding them to observe the voluntary program and to check that there was no slippage over the summer.

In addition, our chairman has appointed a committee headed by one of our Association officers, which, as part of its responsibilities, will monitor the program and encourage our members' full participation.

Self-regulation has been criticized as being weak and ineffective. I believe it can work when an industry's leadership is committed and vocal, as ours is.

Selective media bans have not eliminated cigarette usage in the past and the current proposal to ban cigarette advertising on billboards is simply not going to achieve that result either.

Section 2757 raises both a practical and constitutional dilemma for the Congress. First, it is a highly dubious proposition that government action can effect changes in cigarette consumption patterns through the imposition of selective advertising bans. And the law doesn't afford the Congress latitude to experiment in this manner. By contrast, the outdoor advertising industry has responded to community concerns through voluntary actions which have dramatically confined the dissemination of cigarette advertising in this one medium. Our program has been effective in removing tobacco ads in exclusionary areas and by reducing the overall number of tobacco ads in urban areas. There is simply no valid legal basis or policy support for the draconian selective censorship proposed in this bill.

Senator FORD. Thank you very much, Mr. Bell. I will have a question or two for a witness or two and then turn it over to my colleagues.

Mr. Whitley, first I want to commend the industry for the steps it has taken in recent years to ensure that smoking is an adult custom. One of those steps, and I corrected Congressman Synar, has been to support States setting a minimum age of 18 for cigarette sales. You did not have much time to elaborate on that in your opening statement, but can you give the committee some specific examples of action you have taken in this regard and what kind of success that the institute has had?

Mr. WHITLEY. Thank you, Mr. Chairman. As I indicated in both my written statement and my oral statement, we do support State laws in all States to set a minimum age of 18 for cigarette sales in those States that do not already have it. As I also mentioned,

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last year, with our support in every instance, nine States changed their States to limit minors' access to cigarette vending machines and to change the voting age.

As I indicated, there were some States, including yours, Senator, whose legislatures did not meet this year. We will be pressing in all of those States for an 18-year-old minimum, and we will expect, by the time legislatures have met, that we will have the 18-year minimum in all States.

In addition to that, as I said, we have entered into agreements with retail associations in every State which now has 18 as a minimum age, and I would again call your attention to the board, there, showing the type of material that we are making available free of charge through those associations to literally millions of retail tobacco dealers.

They have large, prominent stickers that we ask them to put on the counters, on cash registers, the kind of stickers that can be put on the shirt of a person at the point of sale, pointing out that it is the law that they do not sell cigarettes, tobacco products, to persons under 18. That is a reminder to the clerk who is selling the products, it is a reminder to those who seek to buy the product, and we think this program is working well, that it has been very successful.

I also mentioned, Mr. Chairman, that we have greatly restricted sampling activities. They are almost nonexistent now. We do send some samples through the mail, but only when we have received a written request for those and a certification that the person requesting the sample is 21 years of age and is a smoker.

So, we believe that we have gone a long way, and we are going to continue to support this program.

Senator FORD. Thank you, Mr. Whitley.

The provisions of the 1984 Comprehensive Smoking Education Act requires the manufacturers to provide the Secretary of HHS with a list of tobacco additives with important restrictions to ensure the confidentiality of trade secrets.

As I remember, the purpose of that provision was to provide HHS with the information they needed to do studies on the potential health risk of tobacco additives. Has HHS done any studies that indicate tobacco additives are posing a health risk, and if not, then there is a real question as to whether HHS needs this authority.

Mr. WHITLEY. Mr. Chairman, under the provisions of the act that you cited, we have provided to the Secretary of HHS for the last 5 years a complete list of all the things that are added to cigarettes to enhance flavor and aroma. HHS has had that for many years. Approximately a year or so ago we had a supplemental request from the Secretary for some quantitative information. We responded by return mail and assured him that information would be forthcoming.

In addition, we assured him that any other information that he might like to have about additives would be available, that our scientists would be available for conferences and discussions. The only thing that we object to, Mr. Chairman, is brand-specific quantitative information about additives, because that is what makes cigarettes different.

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That is a trade secret. We do not want to provide that, but we are perfectly willing to provide, and we have provided, a great deal of information—all that has been requested on additives—and, having had that for 5 years, the Secretary has never given any indication that any more was needed. In fact, he testified before the Kennedy committee in the last Congress that we had been responsive to all of his requests for information about additives, so we do not think there is any need for anything different.

Senator FORD. Mr. Whitley, a couple of quick ones here. As you know, the Federal Trade Commission currently has authority over the disclosure of tar, nicotine, and carbon monoxide ratings for cigarettes. To my knowledge, FTC has not indicated that this system is not working, nor have any sought changes in it. How would shifting this authority to HHS affect the industry?

Mr. WHITLEY. Witnesses for the Federal Trade Commission have testified in the House that the current system is working well. They have closed down the laboratory they were operating, and the reason is, there is one operated by the Tobacco Institute that totally duplicates all their facilities. They keep a Federal monitor there on the premises at all times. They use those results. They are being published—the results on tar and nicotine are being published in advertisements as the FTC has directed. They have not asked for any additional authority, and again there is no reason to believe that accurate information is not being provided.

Senator FORD. As you know, in addition to reviewing provisions of this bill that fall within the jurisdiction of this committee, we are trying to assess the impact this bill will have on interstate commerce. Could you please tell the committee what the impact would be on the tobacco industry in general, with specific examples where possible?

Mr. WHITLEY. Clearly, Mr. Chairman, in those areas where you have differences in taxes and that sort of thing there is a great deal of running back and forth across State lines to purchase cigarettes. Certainly when you market a product in every Middlesex village and town in this Nation, you need completely uniform advertising requirements, you need completely uniform labeling requirements.

We do not think we need a national minimum sales age. We do support, and as I have testified earlier we support strongly the minimum ages at the State level, but bill S. 1088 would establish a national minimum age of 18 and of course that impacts on interstate commerce.

So do the model State programs in S. 1088 and the enforcement provisions in 1088 would directly impact on interstate commerce. So, we believe that other than the—if you want to call it that, educational provisions of S. 1088, virtually everything in it is within the jurisdiction of this committee and not the Labor Committee.

Senator FORD. Let me go to Ms. Richards for a moment. Ms. Richards, you have a unique opportunity, I guess, to work closely one on one with the tobacco industry. Some have discredited and dismissed the industry's Helping Youth Say No campaign as a cynical attempt to get tobacco advertising in the hands of children. Have you found the industry for this campaign to be a sincere and honest stated purpose of discouraging children from smoking?

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Ms. RICHARDS. Sir, I have found them to be totally honest. They have allowed the consortium to be independent in their thinking. My colleagues and I have discussed these type of allegations, and—all of us are very busy people. Aside from doing our jobs we all belong to other types of activities, and we certainly would not be involved if we did not believe that there was some honest effort being made on the part of the industry to stop that. I would not be involved, sir.

Senator FORD. That is a pretty good statement of support.

From your perspective—and I guess you could call it in the trenches, where you are, and it is almost a war out there, not necessarily for smoking cigarettes, but other things. What would you say is the greatest health threat to our children today, and how should Government respond to that problem?

Ms. RICHARDS. Right now, sir, from where I sit, in the neighborhoods that I serve, the greatest health threat seems to be hard-core drugs, violence, and the accompanying aggression and frustration that seems to come with that. I am an elementary school principal, but I am near junior and senior highs. I get to meet with my colleagues, and our continuing concern is the violence and the kinds of aggression, teenage pregnancy, not smoking. Hard-core drug use, yes, but not smoking.

Senator FORD. Mr. Bell, let me ask you a question. The cigarette manufacturers' voluntary code prohibits advertising in publications directed at readers under age 21 or on billboards within 500 feet of schools or playgrounds.

Further, models must be at least 25 years old, and hopefully look at least that old. Tobacco ads cannot use sports celebrities or depict smokers as athletes, and ads cannot suggest that smoking is essential to social prominence, success, or sexual attraction.

Although you stated that you did not have any tobacco accounts, are you aware of the industry's code and can you comment on whether the advertising industry believes tobacco manufacturers take it seriously?

Mr. BELL. First, I would comment on my awareness of the code. I think the industry believes tobacco manufacturers take it seriously—I think the comment specifically regarding Congressman Synar's suggestion that the use of cartoon characters is an enticement for young people to start smoking.

I think we have plenty of cases in our industry, starting with Metropolitan Life Insurance, where the life insurance is not sold to children and yet uses the Snoopy characters. I do not think Owens-Corning Fiberglass is sold to children, yet they use the Pink Panther character. I do not think too many children choose Embassy Suites for their overnight sleep-outs and yet Garfield the Cat has been a spokesperson for Embassy Suites for some time.

It is the industry's belief that the tobacco industry take those regulations quite seriously and is adhering to them.

Senator FORD. Mr. Bell, the Canadian experience is often used as an example by the proponents of advertising restrictions to make a case for more advertising restrictions in the United States.

It is my understanding that earlier this year the court, in Quebec, overturned a 3-year tobacco ad ban, rejecting the claim that

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an ad ban would affect consumption. Is this consistent with your experience in the industry?

Mr. BELL. Yes, as a matter of fact, the Canadian experience which was, quite simply, the most comprehensive case study of the subject using the same documentation and issues that will be used by the proponents of this bill, after 13 months of the court case, 28 expert witnesses and over 30 studies being studied, 2 findings occurred.

One is that a tobacco ban, and not a de facto ban, but in that case a real ban, has no appropriate place in a democratic society, and second, there is no linkage between advertising of legal tobacco products to qualified consumers and consumption.

Senator FORD. I think you may have referred to this in your statement. This will be my last question to the panel, I say to my colleagues.

Section 2758 of this bill partially repeals the Federal preemption on State regulation of tobacco advertising. What would be the practical impact of this provision on the advertising industry?

Mr. BELL. The practical impact of that provision would be to provide a de facto ban on the advertising of tobacco products.

Senator FORD. Thank you, Mr. Bell. Senator Gorton.

Senator GORTON. It is your view, Mr. Bell, if we allow States to ban advertising, they will ban advertising?

Mr. BELL. It is our view that opening it up to the various municipalities, counties and cities, to decide what the warnings are and to decide whether or not the federally mandated health warnings are indeed warning will create a circumstance that will make it impossible to advertise on a national basis.

Senator GORTON. As I understand it and my notes here, the section on the preemption of State and local regulation of tobacco advertising allows State and local governments to enact restrictions on outdoor and transit advertising only.

Is it your view that many of them would do so, all of them would do so?

Mr. BELL. I cannot speak for the various municipalities and what they might or might not do. We believe that it is, will, in fact, create a ban because of the varying restrictions around. We certainly think that the restriction itself violates the first amendment provisions and it discriminatory to the billboard and transit advertisers.

Senator GORTON. You do not believe that this is something that it is appropriate to trust the people of States and municipalities to make themselves? This is too difficult or too impossible a decision to let people make for themselves?

Mr. BELL. I think we have already decided that the regulation of tobacco products is a Federal matter and have taken steps in that regard, starting with the banning of television advertising to the warning statements, et cetera. We believe that it belongs as a Federal matter and not an individual municipality matter.

Senator GORTON. So, the people of Seattle or the people of the State of Washington should not be allowed to make this decision, it is too important, it is too national?

Mr. BELL. I think it is a Federal decision, yes, and has been.

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Senator GORTON. What other products are there the advertising of which we, the control over advertising which we preempt completely at the Federal level?

Mr. BELL. There are none, but there are also none that have totally banned television advertising and required the kind of warnings on the products and in the advertising that tobacco products do.

Senator GORTON. We do not ban television advertising of hard liquor?

Mr. BELL. For hard liquor, yes, but not for beer and wine.

Senator GORTON. Dr. Johnston, as all of you know, we have only a part of this bill in this committee, those elements dealing with labeling and advertising, and there are roughly four sections to it; preemption of product liability, lawsuits, preemption of State and local regulation of advertising, a warning requiring larger warning labels and a new warning label.

If you had to pick the importance of those in discouraging the use of tobacco in order, how would you rank them?

Dr. JOHNSTON. Well, my personal belief, and it certainly came to be the belief of the majority of the Commission members, is that advertising is a very, very potent tool despite disclaimers from the relevant industries here. If you spend $3.25 or $3.5 billion a year to massage the consciousness of young people from the age 2 on up, when they can see point of purchase and roadside and other kinds of publicly visible advertising, then it eventually affects their attitudes and longer term, their behaviors.

So, I would say that—counteradvertising, is that part of what you listed?

Senator GORTON. No. I am just listing what is in the bill at the present time. The repeal of the preemption of State and local——

Dr. JOHNSTON. I think that repeal of the preemption is very important. That permits the reduction of exposure of young people in environments where you simply cannot differentiate exposure to young people from exposure to older people. When you look at what the industry actually does, despite the protestations of innocence, and what we found in the Commission, is that the industry's list of advertising proscriptions has been treated as a list of prescriptions. They place that advertising heavily in magazines which reach young people and underage people. The models may be 25, but their appearance, their clothing, their accoutrements, and their activities are appropriate for somebody who is in their mid-teens.

The Joe Camel was clearly an effort to take an older person's cigarette and make it a younger person's cigarette, because its user population was dying off. So, I think the fact is, advertising (*a*) is powerful, (*b*) is massive, and (*c*) has been aimed at children.

There is a reason for that. If you get a brand loyalty at an early age, you have that customer for most of their life in most cases. And so the individual company has great motivation to go after younger and younger people to get the first crack at that brand loyalty.

Senator GORTON. So, you would rank further controls over advertising as No. 1 on your priorities?

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Dr. JOHNSTON. Advertising is a key issue. It is more important than labeling, in my opinion. Although labeling is important, especially the one about the dependence-producing qualities of tobacco.

Senator GORTON. Mr. Whitley, I am going to give you the opportunity to answer that question from the opposite perspective. I know which one of these elements that Mr. Bell regards as the worst. But in your case, I do not. From the point of view of carrying on your business as a legal business, which of the four provisions on the Federal Cigarette Labeling and Advertising Act is the most onerous?

Mr. WHITLEY. Well, that is a difficult question to answer, Senator. We regard all of them as onerous and particularly anything that bears on advertising and singles out legal product for treatment that is not accorded other legal products.

The fact is, despite the testimony you have heard this morning, that in a number of countries around the world that do not have any cigarette advertising, the rate of smoking among adolescents is higher than it is in this country.

So, the argument that the market is created or expanded by advertising is not borne out by empirical evidence anywhere. In fact, the Surgeon General's own report has admitted that.

So far as the label is concerned, if the purpose of the label originally and now is to warn the public that the Federal Government believes there is a health risk associated with smoking, that warning is out there. As I said in my oral statement and my written statement, there is not any kind of message in the contemporary American experience that is out there to the extent that this is and as specifically.

On the matter of an addiction label, we think that is absolutely the wrong word. It trivializes the great risk of hard drugs and besides, according to the General Surgeon's own data, 40 million Americans, almost one-half of those who ever smoked, have quit, 90 percent without any outside help.

Senator GORTON. Mr. Whitley, is it your position or the position of the tobacco industry that cigarette smoking is not addictive?

Mr. WHITLEY. Well, we certainly admit in the industry the existence of a number of epidemiological studies that have established statistical associations between the use of tobacco products and certain diseases. Now, we do not agree with all of the assumptions that the General Surgeon and a lot of health professionals have drawn from those statistical associations.

Senator GORTON. So, it is your view that such a warning label would be factually erroneous?

Mr. WHITLEY. Yes.

Senator GORTON. Smoking is not addictive?

Mr. WHITLEY. Well, you get into semantics, of course, Senator. But the word "addiction" to the typical American is something that he associates with hard drugs. The American Psychological Association does not even use the term any more, because they say it does not have specific meaning.

But the typical American associates that with hard drugs. And to say to a teenager, you can experiment with cigarettes, cocaine, crack, heroin, all with about the same degree of risk, is the wrong message.

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There has been testimony by people like Dr. Blau, that we have submitted today, that if you say to someone who is smoking and who might decide he would like to quit, "Well, you cannot quit because you are addicted."

And he says, well, "I cannot quit because the Surgeon General tells me I am addicted and if you are addicted to something, you cannot stop." So, we think addiction, the word "addiction," is the wrong word and sends the wrong message.

Senator GORTON. I take it, Dr. Johnston, you disagree.

Dr. JOHNSTON. Oh, I disagree completely. Of course, this has been the position the industry has taken in its liability suits. When you look at the drugs that we think of as classically addictive drugs, heroin, cocaine, crack cocaine, the fact is that many people quit without treatment.

The fact that some people are able to quit does not mean the drug does not have enormous dependence producing potential or addictive potential, if you will. And the fact is, when I look at our data, two-thirds of our young people who have tried crack do not use it any more.

When I look at cigarettes, something on the order of one-half of those people who have tried it still use it. So, the transition rate from trying the drug to using it on a chronic ongoing basis in large quantities is the highest for cigarettes compared with all of the drugs we look at, higher than heroin, higher than crack.

Senator GORTON. Thank you, Mr. Chairman.

Mr. BELL. Mr. Chairman, two quick statements.

One is the ban on alcoholic beverages, distilled spirits, is a voluntary one. It is not a law. Tobacco is the only one. I misspoke. I apologize.

Senator FORD. I might also say tobacco voluntarily went off television before the law was passed.

Mr. BELL. Second, Dr. Johnston has said repeatedly that billions of dollars' worth of tobacco messages have been targeted at children. And I do not believe we have evidence that that is the case at all. Targeting requires the purchase of specific media aimed at children, of which there are an abundance, but which there no tobacco ads in those publications.

Senator FORD. Thank you, ladies and gentlemen. We appreciate your testimony today.

And as the chairman said, we will hold the hearing open for 2 weeks for any additional comments. There may be some questions also submitted in writing. We ask you to respond to those.

Senator FORD. The next panel is Mr. Alan Morrison, director of Public Citizens Litigation Group, Prof. Burt Neuborne, professor of law, New York University School Law, Sgt. Bruce Talbot, Woodridge Police Department, Dr. Ron Davis, M.D., on behalf of Coalition on Smoking or Health, and Mr. Alan Slobodin, I hope that is right, president, Legal Studies Division, Washington Legal Foundation.

We are trying to hold, we all have to get out of here, the banking bill is up. And some of our colleagues are going to other meetings. And we would like to hold your testimony to 5 minutes.

Mr. Morrison, you may go first. We did not get your written statement. We did all the rest of them, but will we have that?

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Mr. MORRISON. Yes, Mr. Chairman. As I explained to your staff I was only asked to testify on Tuesday afternoon. It was impossible for me to prepare it before then. I will submit a written statement.

Senator FORD. That will be fine. You may proceed.

STATEMENT OF ALAN MORRISON, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON, DC

Mr. MORRISON. First I want to begin by making two points clear about my testimony today.

The first is that I have been actively involved in a number of the first amendment cases that led to the recognition by the Supreme Court that commercial speech is entitled to first amendment protection. In particular, I argued the *Virginia Citizen Consumer Council* case and others as well.

Second, I am actively involved in the litigation over the meaning of the current Federal preemption provision in the Cigarette Labelling Act. I filed an amicus brief in the Supreme Court of the United States urging that the present law does not preempt the bringing of common law and statutory actions for damages in the *Cippilone* case, which is now before the Court.

I first want to address section 2757 which is the clarification of preemption. As I mentioned before, I truly believe that this is a clarification of existing law and that the tobacco industry has no legitimate basis for claiming that the present law preempts suits for damages. I say that because the first thing is, the tobacco industry never asked for a preemption of damage claim. The Congress never gave it to them, never mentioned it. And third, it provided no Federal substitute for an important State right.

Be that as it may, it is entirely appropriate for the Congress to clarify its intent one way or the other. I believe that the intent is correctly clarified here as it was with the Smokeless Tobacco Act. Indeed, as soon as the tobacco industry made known its belief that smoking damage suits were preempted by existing Federal law for cigarette products, the Congress immediately took steps in the Smokeless Tobacco Act to ensure that the industry did not make such spurious claims there. That provision has worked very well for the smokeless tobacco law, and I believe it would work very well for the Federal law governing cigarette labeling as well.

There is, in my view, no constitutional issue with regard to this and no policy in favor of preempting State laws. All that would be required, if this provision became clarified as the existing law, is that juries around the country could, if they found the evidence justifying the verdict, award money damages. There would be no warning label requirements, no affirmative requirements of any kind.

Senator FORD. Let me ask you something.

In my opening statement I asked that we stay out of that tort question.

Mr. MORRISON. This is the preemption issue, sir.

Senator FORD. I understand. But you are getting into the tort liability. In light of the pending case at the Supreme Court, I am not trying to be smart aleck with you this morning, we have been asked not to discuss that in the committee this morning because it is before the Supreme Court. And I am revealing to you and I

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hope that you would yield to my wishes and the committee's wishes and those that suggested that we stay away from it.

I am not a lawyer, therefore I have a lot of trouble understanding what you say anyhow. So, if you would accommodate me on that, I would be grateful to you, Mr. Morrison.

Mr. MORRISON. I would like to do that, Senator, but I do not think some of the other witnesses have accommodated you in that regard. They have spoken about the ban, that this would have an effect that would require differing advertisements in different States around the country. It seems to me to be demonstrably not the case, and I thought I ought to say that in response to what was said here.

But I will go on to the next section, Senator.

Senator FORD. Thank you very much, Mr. Morrison.

Mr. MORRISON. I want to turn to section 2758 of the bill, which is the partial repealer of certain preemption provisions.

First, I want to note that this is a considerably narrower version than the partial preemption repealer in S. 1883, which has previously been debated in the Senate. Indeed, I note that the American Civil Liberties Union, which at one time opposed that provision, is no longer in opposition to it.

That provision has three separate elements which raise in my view no constitutional question. They are entirely questions of policy: Should the Congress insist upon its dominant role in this area or should it not?

The first amendment, of course, cannot be overruled by Congress and nothing in the bill purports to do that. The recognition of the first amendment consideration seems to be appropriate, but unnecessary.

Now there are three parts to this partial repealer and I think it would be helpful to deal with them separately.

The first deals with the allowance of local laws on the sale and distribution of tobacco products, including vending machines and free samples. It is my opinion that the present law does not preempt those kind of activities by the States anyway. If the State of Washington wanted to ban the giving out of free cigarettes to anyone, in particular to children, there is nothing in the present law that would forbid it.

But I see no harm in clarifying that law to make absolutely certain that the States can do those kinds of things, and particularly appropriate for them to do so given the other emphasis in other parts of the bill which are not before this committee. That is the first one.

The second one, and this relates to outdoor billboards, is in my view, quite narrow. It is not a content-based restriction. It only deals with the placement and location of stationary outdoor advertising billboards. It is not a content ban. No one can require additional warning labels, even on stationary advertisements. All it can do is to say that there are certain places where it is inappropriate for tobacco companies to advertise. And that is a decision that will be made by the people closest to it.

The residents of Seattle, WA, the State of Washington, could ban outdoor billboards in certain locations.

Senator GORTON. Or everywhere.

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Mr. MORRISON. It is not absolutely clear to me that they could do that. It says placement or location. And I would assume that that would not be everywhere. But if the committee believes it is different, then it ought to make it clear. I think that those words were chosen in order to limit, but not deny the right of outdoor advertisers. And some of the claims that it is going to eliminate outdoor advertising are, it seems to me, untrue as a matter of interpretation of this bill. Whether they ought to be true or not is a different question.

So, therefore, it would be entirely appropriate to ban advertising on billboards within 500 feet of a school, in certain neighborhoods, or in athletic stadiums where tobacco advertising continues to be very prominent.

All this provision says is, there is no Federal preemption.

Third, the transit provision. All this says that if you, a State or locality, own a transit authority, you do not have to advertise tobacco products, and you can keep them off if you want. If you are trying to eliminate smoking, you do not have to take out advertising to promote it.

In my view, again, this provision is not necessary because I believe the State transit authorities are not preempted from doing it, but I have absolutely no objection to making it perfectly clear in this bill that preemption does not extend that far.

The last point I want to make is that if the clarification in section 2757 is enacted, it would become effective immediately. The Supreme Court has made it clear in *Bradley* v. *School Board* and other cases that the law, that the Court will interpret, is the law in effect at the time of decision unless there is some other effective date put into the statute.

Thank you very much.

Senator FORD. Professor, you are next.

STATEMENT OF PROF. BURT NEUBORNE, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY

Mr. NEUBORNE. Thank you.

May I also disclose that I, too, filed a brief in the pending Supreme Court case, the *Cippilone* case. Not surprisingly, I filed a brief that differed substantially from Professor Morrison's version.

Senator FORD. We already have a disagreement between two lawyers, one that I have a great deal of respect for and so forth, so that is one reason I am not in the business.

Mr. NEUBORNE. Well, I am sure that I can be as confusing as he can to people. [Laughter.]

Mr. NEUBORNE. May I begin, I think, not by discussing the 2757(b), which is the issue pending before the Supreme Court, I will mention it a bit at the end of my testimony, but focus again on the material that Professor Morrison just discussed. And that is 2758, which is the provision dealing with lifting preemption on regulation of outdoor and transit advertising.

Let me say, first, I agree with much of what Professor Morrison said. And that is that much of the bill is completely unnecessary because I do not think, properly read, preemption prevents existing State and local authorities from engaging in content-neutral regu-

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lation of outdoor and transit advertising even if that content-neutral regulation effected tobacco.

The ban on State and local activity in this area flows not so much from preemption, but from the first amendment; from the fact that the one single strand that runs through our first amendment jurisprudence is suspicion of content-based regulation. When you single out a particular product or a particular topic and say that it is going to be regulated in ways that speech not discussing that same topic is not regulated, you have set up the very dynamics of the worst kinds of censorship.

The real flaw in 2758 is that it is an invitation, a virtual request, to State and local authorities to engage in the kind of content-based regulation of speech that is particularly dangerous in our heritage. To suggest as my colleague has that this is not content-based because it simply deals with placement and location overlooks one thing. It deals with the placement and location of a single type of speech, which is determined on the basis of content. It is tobacco speech that is singled out for special regulation on content and placement.

If all outdoor advertising or all transit advertising were to be subjected to content-neutral regulation, I suggest to the committee there is plenty of authority at the local level to do whatever it is they think they should do without responding to an invitation from Congress to engage in what would be a flagrant violation, in my opinion, of the first amendment.

Indeed, I think that 2758 might diminish the power of State and local entities because it would invite them to engage, not in content-neutral regulation, which would have a chance of being sustained, but it would invite them to engage in content-based regulation, which would be the weakest form of regulation that they could undertake under the existing first amendment structure.

The existence of time, place, and manner regulations that can be imposed on transit and outdoor regulation really make it unnecessary to have a bill like this. The real focus for this bill, the real impetus behind 2758 has nothing to do with preemption. It has to do with the allegations of so-called targeting. The argument is that somehow the tobacco industry is inappropriately "targeting" either racial minorities or women or other vulnerable segments of the population and that the way to deal with it is to engage in content-based regulation of their speech; to stop them from the speech because of the fear that they are targeting a particularly vulnerable population.

There are two, I think, very serious problems with that. I want to differentiate moral criticism of targeting. I think it is perfectly reasonable to criticize advertising on a moral basis on the basis of targeting. The question is, can you use targeting as a legal basis to impose Government regulation. And I think for two reasons you cannot.

First, targeting requires, as a legal basis for regulation, an assumption that there is something inherently vulnerable about the groups; that there is something inherently vulnerable about black people or inherently vulnerable about women that makes them less able to withstand an advertising message. That is the kind of paternalistic assumption about the inability of groups in our society

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to make their own judgments that has been the principal reason that we have been unable to achieve equality in the society.

To suggest that some groups are more vulnerable than others and therefore need special paternalistic State protection against speech is to lead directly back into the kind of plantation mentality that allowed those groups to be "protected" out of their rights for 100 years.

Second, once you begin that road, it is a very dangerous road. The Second Circuit, for example, has just held that advertisers are liable because they do not "target" enough. They have just imposed liability on the New York Times for failing to "target" adequately in their housing advertisements; claiming that the failure to target the black community for housing ads sets up liability under existing Federal law. So, we have here the potential for a whipsaw. If you do not target, you are going to be liable. If you do target, you are going to be censored. The net result is going to be a kind of racial and sexual quotas about who speech gets directed to.

There simply could not be a more dangerous way to begin to regulate speech in this country than to try to set up some sort of politically correct standard of whether the target audience is of the right racial complexion to meet some sort of Federal standard.

The final thing I would like to say is about 2757. I will, of course, respect the Chair's suggestion that we not get deeply into that issue.

The question of general tort preemption raises a very important question of policy. The question of policy is: When you are regulating controversial speech—whether it is cigarette advertising; or labor speech; or integration speech; any type of controversial speech—do we want a single, uniform national rule. Whatever the content of the rule, do we want a single, uniform national rule regulating the speech or do we want to delegate an essentially uncontrolled discretionary power to the juries of 50 States to make the rules up as they go along in the emotional context of a tort case? That is the basic policy judgment that is before Congress. Not the judgment of what the rules should be; but whether there should be a single predictable rule.

Thank you.

[The prepared statement of Mr. Neuborne follows:]

PREPARED STATEMENT OF PROF. BURT NEUBORNE

My name is Burt Neuborne. I am a Professor of Law at New York University. For much of my professional career, I have defended the values of freedom of speech and press that are at the heart of the First Amendment. I appear this morning on behalf of the Association of National Advertisers, Inc. (A.N.A.), the nation's oldest and largest association of commercial speakers. A.N.A.'s members advertise a kaleidoscopic array of goods and services, accounting for 80 percent of the nation's national and regional advertising expenditures each year. I also represent the Freedom to Advertise Coalition, whose members include, in addition to A.N.A., the American Advertising Federation, The American Association of Advertising Agencies, The Magazine Publishers of America, The Outdoor Advertising Association of America and The Point of Purchase Advertising Institute.

Thank you for this opportunity to present advertisers' concerns about the troublesome free speech implications of certain aspects of S. 1088.

Section 2757(b)

Whenever Congress seeks to regulate speech (in this case cigarette advertising), legislators face a fundamental choice between: (1) establishing national, consistently applied rules of law that provide speakers with predictable guidance; or (2) exposing

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speakers to multiple, unpredictable and potentially conflicting state and local standards. Until now, Congress has generally recognized that a single, predictable national standard governing controversial speech is infinitely preferable to a decentralized regime that inevitably Balkanizes the information market by inviting a patchwork of unpredictable and non-uniform local speech regulations.

The advertising industry is acutely aware of the costs—both to advertisers and the consuming public—of Balkanized state and local regulation of commercial speech. Under a Balkanized regime, commercial speakers, facing multiple and unpredictable local rules, find it impossible to conduct effective nationwide campaigns. The necessity of tailoring national advertising campaigns to a host of differing state and local rules, renders it difficult, if not impossible, to craft a uniform and effective national message. When commercial speakers seeking to communicate with a national audience are forced to comply with a series of overlapping and, often, conflicting state and local rules, three adverse speech consequences inevitably follow. First, the duty to comply with differing local speech regulations impedes effective communication by complicating and, often, precluding the use of nationwide, uniform messages. Second, the cost of local tailoring imposes a significant and wholly unnecessary economic burden on the commercial speech process. Third, the invitation to exercise ill-defined local regulatory authority over controversial speech inevitably translates into guerrilla warfare aimed at preventing the speech entirely.

Unfortunately, in a significant departure from Congress' usual preference for uniform, predictable national rules governing commercial speech, S. 1088 opts for a wholly unstructured approach to regulation of cigarette advertising that would permit juries in 50 states to forge shifting, unpredictable and retroactive speech rules purporting to gauge the advertising's adequacy. A.N.A. believes that the authorization of such an obviously unpredictable patchwork of local commercial speech regulations would substitute unpredictable chaos for the rule of law.

S. 1088 backs into its rejection of uniform, national speech rules through Sec. 2757(b), which provides:

> Nothing in this Title, the Federal Cigarette Labeling and Advertising Act or the Comprehensive Smoking Education Act of 1984 shall be interpreted to relieve any person from liability at common law or under State statutory law to any other person.

The apparent effect of the literal terms of Sec. 2757(b) would be to empower the juries and legislatures of each state to adopt 50 different standards governing the retroactive liability of cigarette advertisers for allegedly misleading commercials depicting the relationship between smoking and health. Instead of a single national, uniform standard imposed by Congress and enforced by the Federal Trade Commission, Sec. 2757(b) would apparently authorize a crazy-quilt of local, unpredictable speech rules forged by buries in the emotional context of a tort action.

It is, frankly, unclear whether the drafters of S. 1088 actually intend to affect advertising at all. Much of the legislative history of Sec. 2757(b) appears to deal with legal issues wholly unrelated to advertising. Unfortunately, the literal text of Sec. 2757(b), coupled with ambiguous statements in the legislative history, create an unacceptable risk that the provision would destroy any hope of uniform speech rules in the area. Under the provision, advertisers would be required to meet the federal duty to warn standard and then be subject to liability under 50 unknown—and unknowable—state standards administered after the fact by state juries.

While the provision's legislative history stresses that it is not intended to authorize state officials to compel advertisers to include additional warnings that differ from the federal warnings, the effect of the liability provision causes precisely such a result. It matters not at all to an advertiser whether non-uniform speech rules are imposed directly by an official, or indirectly through liability findings by a jury. The net effect is identical—the advertiser falls under a legal duty to comply with a patchwork of non-uniform local speech rules.

It is simply irrational to forbid state judges and state administrators from imposing non-uniform speech rules on advertisers, only to permit state juries to achieve precisely the same result after the fact. By forbidding state judges and regulators from directly imposing non-uniform speech rules, S. 1088 recognizes the importance of retaining uniform national speech rules in this area. However, after carefully locking the barn door, Sec. 2757(b) sets fire to the barn by authorizing state juries to apply an unpredictable patchwork of differing local rules and standards to test the adequacy of warnings in tobacco advertising, especially concerning the relationship between smoking and health. In place of existing law which places the responsibility for policing the adequacy of tobacco advertising concerning the relationship between smoking and health in the Federal Trade Commission, the bill would substitute the standardless discretion of 50 state jury systems applying differing, and potentially conflicting, legal standards.

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Such a shift in regulatory philosophy poses a serious danger to the commercial speech process and marks a decided departure from past Congressional practice. Commercial speech thrives when it is subject to a single set of rules, applied in a uniform and predictable manner by a skilled regulatory body. Commercial speech withers when it is forced to comply with an unpredictable patchwork of local regulations that render it impossible to craft a uniform message at an acceptable cost.

The single most disturbing political failure of our society—the voter registration process—illustrates the risks inherent in patchwork local regulation of speech.

American democracy faces a crisis because fully half the nation's eligible voters do not participate in the electoral process. Observers are unanimous in singling out our voter registration system as a principal culprit in the problem. While over 75 percent of eligible voters cast ballots once they have been induced to register, repeated attempts to increase the pool of registered voters have failed, in large part because the registration process is subject to precisely the type of patchwork, local regulation contemplated by S. 1088. The bewildering array of state and local registration rules has made it impossible to craft an effective nationwide voter registration campaign. In the absence of such a campaign, the capacity of modern communication to inform and to motivate is eroded. Moreover, the delegation of voter registration to politically interested local authorities has encouraged manipulative and unfair practices aimed at impeding registration.

If relegating voter registration to a patchwork of local regulations has made it impossible to craft effective nationwide messages and has led to unfortunate local behavior aimed at sabotaging the process, relegating tobacco advertising to an even more standardless set of local regulations assures the same negative effects.

Instead of experimenting with information Balkanization, maintenance of the existing uniform set of rules, administered in a predictable way for the past 25 years by a skilled regulatory body, the Federal Trade Commission, would be infinitely preferable. The issue is not whether the adequacy of tobacco advertising should be policed. Of course it should. The issue is whether the policing mechanism should be uniform, predictable and efficient; or a patchwork of differing local rules, applied in an unpredictable way by the juries of 50 states.

When similar issues of regulatory philosophy have been presented to Congress, Congress has overwhelmingly opted for uniform rules governing the regulation of controversial speech.

For example, in the context of speech affecting labor relations, Congress imposed a uniform set of national rules, to be administered by the National Labor Relations Board. Eg. *Garner* v. *Teamsters Union*, 346 U.S. 485 (1953) (NLRA preempts state common law remedies for injunctive relief against peaceful recognitional picketing); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959) (state common law damage claims arising out of peaceful picketing activity preempted by the NLRA); *Teamsters Union* v. *Morton*, 377 U.S. 252 (1964) (state common law damage claims for unlawful secondary picketing activity preempted by NLRA); *Machinists* v. *Wisconsin Employment Rel. Comm'n*, 427 U.S. 132 (1976) (state laws forbidding concerted refusals to work overtime preempted by NLRA).

In the context of broadcast regulation, Congress has also insisted upon uniform national regulatory standards when controversial communications are at issue. Eg. *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959) (state common law actions for libel against broadcasters preempted by the Federal Communications Act); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984) (Congress' desire for uniform rules preempts Oklahoma's attempt to ban liquor advertising from local cable television); *City of New York* v. *F.C.C.*, 486 U.S. 57 (1988) (New York City's attempt to set technical standards for local cable television preempted by the Cable' Broadcasting Act).

The most dramatic examples off Congress' oft-expressed preference for uniform national regulatory standards in sensitive areas of controversial speech and association exist in the national security area. Eg. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) (Pennsylvania Alien Registration statute preempted by the Federal Alien Registration Act); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1950) (Smith Act preempts attempts by states to prosecute for sedition against the United States).

Finally, in the commercial speech context at issue in this statute, Congress has repeatedly recognized the wisdom of uniform national standards when it regulates commercial speakers. Eg. *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954) (federal statute authorizing national banks to accept savings deposits preempt New York's limitation on the use of the word "saving" or "savings" in bank advertising); *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977) (federal weight labeling rules preempt California's attempt to impose more stringent weight labeling standards); See also *Capital Cities Cable, Inc.* v. *Crisp*, supra.

The delegation of standardless regulatory power over tobacco advertising to 50 state jury systems in S. 1088 is, therefore, inconsistent with Congress' traditional

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regulatory philosophy. Indeed, it renders it virtually certain that Congress will lose control of the regulatory process in this sensitive area. Sec. 2757(b) is, at bottom, a decision to delegate standardless regulatory authority over tobacco advertising to state juries, with the virtually certain loss of uniformity, predictability and principled administration.

Section 2758

Sec. 2758 of S. 1088 invites local authorities to regulate the "placement or location of stationary outdoor advertising of tobacco products, or transit advertising of tobacco products. * * *"

As the language of the bill recognizes, an extraordinary Congressional invitation to regulate the placement or location of speech on the basis of its content raises extremely serious free speech concerns. The one constant that runs through the Supreme Court's First Amendment jurisprudence is a refusal to tolerate content-based attempts at censorship. Sec. 2758 flies in the face of that constitutional tradition by inviting local officials to censor tobacco advertising solely on the basis of content.

In an effort to mitigate the provision's obvious First Amendment problems, the drafters include language cautioning that any regulation must be consistent with the First Amendment. However, merely placing language in a bill cautioning that content-based regulation may occur only "to the extent consistent with the First Amendment to the Constitution" is a meaningless tautology. Congress cannot authorize behavior in excess of the First Amendment and the statute provides absolutely no guidance to local authorities about the limits of the delegation. As drafted, the statute is, quite frankly, simply an invitation to unconstitutional content-based regulation.

If outdoor or transit advertising is to be regulated, it must be on the basis of content-neutral criteria that do not smack of content-based censorship. Such constitutionally permissible regulatory power already exists. S. 1088 is not required to create it. Indeed, by couching regulatory authority in constitutionally offensive content-based terms, the bill may actually reduce the ability of local officials to deal with outdoor or transit advertising on content-neutral grounds.

The obvious goal of S. 1088 has nothing to do with content-neutral regulation. Rather, its purpose is to invite local authorities to limit outdoor or transit tobacco advertising solely on the basis of its content. As such, it is an invitation to violate the First Amendment.

The desire to place content-based limits on outdoor or transit advertising of tobacco products stems from the assertion that it "targets" women and racial minorities. Such an argument is, ultimately, premised on an assumption that women and racial minorities are particularly vulnerable to the "siren song" of advertising and must be protected against their gender or race-based weakness by a paternalistic state.

As Benjamin Hooks, Executive Director of the NAACP has noted, the paternalistic "targeting" rationale for content-based censorship of tobacco advertising is an unfortunate throwback to an earlier era, when the so-called vulnerability of women and racial minorities was used an excuse for paternalistic measures that "protected" them out of the right to vote and the right to an equal job. Race and gender-based paternalism cannot be used as a means to justify content-based censorship of speech directed to a particular group without reinforcing the very stereotypes that have frustrated our attempts at achieving equality.

When an advertiser of a lawful product directs advertising to women or a racial minority because the advertiser recognizes the personal preferences of the group, it is a sign that the preferences and interests of women and racial minorities are no longer being ignored. The problem with advertising in America is that it does not "target" women or racial minorities enough.

Ironically, the Second Circuit has recently imposed liability on advertisers for not adequately "targeting" racial minorities in connection with housing advertisements. *Ragin* v. *New York Times*, 923 F.2d 995 (2d Cir. 1991). Sec. 2758 completes the whipsaw by inviting censorship because advertisers "target" too much. Licensing local bureaucrats to engage in content-based censorship of outdoor and transit advertising based on the racial characteristics of models, the racial composition of the audience, or the advertising policies of competitors is an appalling mistake. Content-based censorship is bad enough; content-based censorship at the hands of a patchwork of hundreds of local bureaucrats is even worse; but local content-based censorship triggered by a test of politically correct "racial sensitivity" is a First Amendment disaster.

Existing law provides local authorities with adequate power to establish content-neutral "time, place and manner" regulations governing outdoor and transit advertising. Sec. 2758's invitation to impose content-based censorship based on the al-

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leged vulnerability of racial groups to particular messages should be resoundingly rejected.

Senator FORD. I understand that Mr. Morrison and you, Professor, may have a time crunch. And, Professor, I would not want your students to miss your teaching this afternoon. And Mr. Morrison, I understand you have to leave.

If you gentlemen want to leave now, we will submit questions to you in writing.

Mr. NEUBORNE. That is very kind of you, Senator. I am not sure my students would thank you, but my dean will thank you.

Senator FORD. I will take any thanks I can get at this stage. [Laughter.]

I understood that you were pressed and we are grateful to both of you coming here today and giving your expertise.

Mr. MORRISON. Senator, I do have some more time. I was not sure how long this would run. I can be here till 12 o'clock.

Senator FORD. All right. Fine. But, Professor, if you wish to go, it is up to you.

Mr. NEUBORNE. If it is all right with the committee and you do not think it rude, thank you very much.

Senator FORD. It is not rude, I offered.

Mr. NEUBORNE. Thank you.

Senator FORD. Sergeant Talbot, next please, sir.

STATEMENT OF SGT. BRUCE TALBOT, WOODRIDGE POLICE DEPARTMENT, WOODRIDGE, IL

Mr. TALBOT. Mr. Chairman, thank you. I am very happy to be here. I almost was not here. I left my house this morning at 5:30 to catch a Midway Airlines flight to Washington National. [Laughter.]

I want to publicly thank United for honoring Midway's ticket.

Senator FORD. I thought maybe you might have had Northwest. [Laughter.]

Mr. TALBOT. I am going to miss that airline.

Mr. Chairman, I want to go on record as supporting Senate bill 1088. This is a bill that I believe we really need in our country, not just to reduce the thousands, hundreds of thousands of deaths that occur every year from tobacco, but to give me help in my assigned duty of doing a drug prevention program in our community.

The past 3 years I have been teaching a 17-week drug prevention program trying to stem our children from turning to illicit drugs. And what we recognize is that tobacco for an adolescent is considered a gateway drug. Now by gateway drug, I do not mean this is the first drug they use, but by gateway drug I mean that there is a very real physical connection between a very hard statistical connection.

The National Institute on Drug Abuse found that 92 percent of adolescent marijuana smokers are also regular daily cigarette smokers. What is the physical connection between the statistic? A 13-year-old child, Mr. Chairman, has a very difficult time deeply inhaling and holding harsh marijuana smoke in their lungs without first becoming an accomplished cigarette smoker. So, when we have our principal saying that her main concern is crack cocaine smoking, I agree with her. It is our concern, too. Woodridge, IL has

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the dubious honor of having the first two crack cocaine arrests in DePaul County, IL.

But what we recognize is the time to get excited is not when the child is already into cocaine. The time to get excited is when the child begins to experiment with illicit drugs and begins to use tobacco at age 13, the average age kids begin to use.

When a lawmaker considers adopting a bill, I imagine that the first question they ask is, Is there a problem that is important enough to address it with a law? And No. 2, Will this law work? Many people will tell you that laws are not going to change children's behavior patterns, they are going to go out and smoke anyway.

I am very happy to tell you that DePaul University of Chicago did a study in my community that found 83 percent of our merchants were selling tobacco to 13-year-old children after being warned in writing by the police that that was going to get them arrested. It was not until I wrote and our city implemented a license law and we began to suspend tobacco vendors' license for repeat sales to minors that we were able to bring our sales rate down to zero.

But most importantly, after a 2-year study of what happens to the 650 13- and 14-year-old children in our schools, we have been able to document over a 50-percent reduction in adolescent smoking by controlling the supply of tobacco to children.

Why does a 13 year old get involved with cigarettes? I firmly believe that a major cause is advertising. We have heard this morning that, gee, advertising is not really important. We are only advertising to adults. And besides, Metropolitan Life uses Snoopy. Think about that Snoopy ad for a minute. When you think of Snoopy you think of your children. What does a life insurance company want you to buy life insurance for? So that you collect the money? No. So that it protects your children. Of course, they are advertising for children.

In my drug prevention class I have my 13-year-old students walking in the class with this from the Camel cigarette company. As it is mailed to the child, they have printed on here, personal, don't open this, mom.

Now if you are going to be able to believe the industry is advertising to adults by using cartoon camels, some in front of an aircraft carrier pretending to be top gun. This guy is front of a Ferrari with a beautiful model in the background. Does the industry really believe that a 30-year-old adult smoker is going to change from Marlboros to Camels because of a cartoon camel in front of a Ferrari? If this is not aimed at 13- and 15-year-old males going through puberty, I do not know what ad could be more reprehensible.

And finally, let me close by saying that as I have been traveling across the country, I have been very, very surprised and disappointed to see a number of merchants across the country selling loose, individual cigarettes, broken pack sales. I could not find what law it was against, Mr. Chairman. It is not against the Federal law because I wrote the Federal Tobacco and Firearms. It is not against Illinois State law because I wrote our department State police.

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When I walked in and there is a bowl of Bazooka bubble gum for a nickel and right next to it is a bowl of Marlboros for a dime. Now what adult smoker goes into a Minuteman Mini-Mart and buys one cigarette for 10 cents?

In addition, this practice gets around the warning. There are no warning labels on these little bowls of loose cigarettes.

If we are going to make a major step in reducing our adolescent illicit drug use, we need to begin at the beginning. And that beginning is tobacco. I think it is wrong for merchants to be able to sell to 13 year olds.

And 13 year being the average, reflect on a phone call I got from the principal of a Love Joy elementary school. He said, "Sergeant," he says, "I had two of my third grade students, 9 years of age, were buying Hawkins Rough Cut Wintergreen chewing tobacco at the Clark gas station while they wait for their school bus."

We need this legislation to eliminate that.

Thank you for hearing me out, sir.

[The prepared statement of Mr. Talbot follows:]

PREPARED STATEMENT OF SGT. BRUCE R. TALBOT

I want to go on the record in support of S. 1088, the Tobacco Product Education and Health Protection Act of 1991, now pending before the committee, because my professional experience in controlling tobacco access to minors leads me to believe only a national approach will meaningfully reduce teenage addiction to tobacco.

I know that a well crafted law, evenly enforced can make a significant change in both merchants and adolescent smokers behavior. I am very proud to tell the committee that DePaul University has documented a reduction in the sale of cigarettes to a 13 year old minor from 83 percent sales rates before our new license law was enacted, to back-to-back zero sales rates after merchant tobacco licenses were suspended. But more importantly, adolescent smoking rates have been reduced by over 50 percent! The largest decrease in adolescent smoking ever measured.

The reason I am calling for a national law when the local tobacco control law I wrote is working so well is the disturbing findings DePaul University made on the behavior of merchants that are just outside the jurisdiction of the Woodridge Police. A control group of tobacco merchants in Chicago showed a tobacco sales to minors rate of 87 percent. But those merchants whose stores surround but lay just outside the Woodridge city limits were found to be selling at a rate of 94 percent.

These merchants know all about the issues of tobacco sales to minors because the Woodridge tobacco control law has made the front page of the Chicago Tribune and the two local weekly newspapers, and was featured on all three network television news shows. These merchants also know that the police in their community have no similar law and therefore there is no penalty or risk to sell cigarettes to children. Woodridge children were able therefore to evade our tobacco control law by merely walking across the street to illegally buy their cigarettes in a boarding town without a license law.

The issue of tobacco access by minors is important because tobacco addiction accounts for more American deaths then cocaine, heroin, drunk driving, and murder combined. The Surgeon General's office found that tobacco addiction is similar to cocaine or heroin addiction. Indeed, the National Institute on Drug Abuse found that the recidivism rates for adults who want to quit and have attended a medically supervised withdraw program are lower for heroin than for tobacco. But smokers do not become addicted to tobacco as informed adults. The National Institute on Drug Abuse found that 90 percent of adult smokers started their addiction as children, too young to legally buy cigarettes. A study of high school student smokers, some smoking less than half a pack per day found that 51 percent had tried but were unable to quit smoking.

Many times I have heard that cigarette smoking is an adult freedom of informed choice issue. But in reality, adult smokers have their freedom of choice stolen from them by tobacco addiction as children, too young to make an informed choice.

Woodridge treats tobacco in much the same manner as liquor, in that we now require a vender to obtain a city tobacco license. This license is not just another euphemism for the word tax, but rather is similar to a drivers license, in that the cost is only that necessary for administration of the law, ($50 per year per location), and

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that the license is suspended or revoked for repeat sales of tobacco to under age minors, much like a driver's license is suspended for repeat speeding tickets. The effect of a civil license suspension rather than a criminal arrest for a state statute is evident in the words of one of the managers of a gasoline station that received a $400 fine and one day suspension of his tobacco license; "I don't care about the $400 fine, I do between $200 to $400 a day in tobacco sales. What killed me was when I had to tell a customer I can't sell him cigarettes because the city suspended my license and then watch my customer walk across the street to my competitor to buy."

The committee will no doubt hear from lobbyists saying that it is only a few stores that are selling cigarettes to minors and that a educational campaign can control such sales. However the Secretary of Health & Human Services, Dr. Louis Sullivan found in the Inspector General's 1990 report, "Youth Access To Tobacco", that although 48 states have laws banning sales to minors they are seldom enforced and that under age minors find it "very easy" to purchase cigarettes. What the committee will not hear from the lobbyist is that 3 million American children under age 18 consume 947 million packs of cigarettes per year, according to a study published in the Journal of the American Medical Association. Although it is estimated that cigarette sales to minors accounts for only 3 percent of tobacco industry profits, these minors soon become addicted and then become a fiercely brand loyal consumer of cigarettes for life. Without teenage addiction to tobacco the adult smoker market would soon die out, literally.

In other communities that I have traveled to in regards to creating a tobacco dealers license law, the local merchant groups have vehemently opposed the concept of licensing. In one community, Woodstock in northern Illinois, the Chamber of Commerce unanimously passed a resolution opposing licensing and pledged to self-police the sale of cigarettes to minors. This was after a study by the McHenry County Health Department found 87 percent of the merchants sold cigarettes to minors. The Woostock City Council narrowly defeated the license law, with the mayor saying if the merchants pledged not to sell that was good enough for him. Several months later DePaul University researchers conducted a controlled study to see how well the Woodstock merchants were doing under the Chamber of Commerce self-policing plan. 94 percent of Woodstock merchants now sold to the minor! When the city council defeated the license law the message was loud and clear to the merchants: its open season and there are no limits.

By far the must reprehensible merchant behavior I have seen was at the Minuteman Mini-Mart chain stores. I stopped in to ask directions and saw a plastic bowl filled with bubble gum for a nickel and right next to it was a Clear plastic container with loose individual cigarettes for a dime. Now what adult smoker walks into this store and buys one cigarette for ten cents? None. This was very clearly aimed at children's pocket change. Broken pack sales of cigarettes should not be allowed.

Industry lobbyists will tell the committee that warning signs and buttons are effective in preventing minors from buying cigarettes. However a recent study in Buffalo, New York, by the Rosewell Memorial Cancer Institute found the sales rate for 60 stores that were given tobacco age warning signs to post verses 60 stores that were a control had the same sales rates to children. Signs and buttons are merely window dressing when there is no enforcement of age restrictions. This finding was supported in the DePaul University study that found virtually no difference in the sales rate to minors between Chicago merchants with warning signs and those without.

One argument I hear often is that current state laws should be enforced rather than adding yet another federal regulation. The problem with this argument is that many of the state laws have no enforcement clause or contain penalties that render enforcement impractical, such as the Washington, D.C. law that carries a $2.00 fine.

Again I would like to make a comparison to alcohol. In Illinois the legislature lowered the drinking age to 18 during the Viet Nam war under the theory that if a young man was old enough to fight and die for his county he should be old enough to buy a beer. What this great social experiment found was that Illinois was killing more of its sons and daughters and innocent third parties in drunk driving accidents then in the Viet Nam war. Illinois raised the drinking age to 21 but the state of Wisconsin, (the country's largest producer of beer), maintained the age limit. With most of our population clustered near the Wisconsin border, Illinois teens merely drove across the border for their weekend drinking spree and then attempted to drive home to Illinois, drunk. It was not until the federal government threatened to cut off highway funds to any state that did not raise the drinking age to 21 did Illinois meaningfully reduce teenage drunk driving deaths. If teens are unable to make responsible decisions about beer at 18 they are also unlikely to make sound decisions about cigarettes at 18. I support raising the tobacco age limit to 21.

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Not until the federal government adopts uniform access control laws that are enforceable will we see a meaningful reduction in this countries teenage smoking rates. According to the Surgeon General every day another 3,000 children start to smoke, every year we kill another 450,000 Americans from tobacco use.

S. 1088 deals with the advertising of tobacco products. In the three years I taught a 17 week drug prevention class to our children I saw several of them wearing Camel brand cigarette shirts featuring a cartoon camel. During the lesson on media advertising of recreational drugs many students would bring in these Camel brand cartoon ads and large color wall posters featuring the cartoon camel az the "leader of the pack" in black leather jacket on a motor cycle or as a "top gun" jet fighter pilot, but always with a Camel cigarette hanging from his lips. For the industry to say that the billions of dollars spent on tobacco advertising is only aimed at switching adult smkers from their current brand is ludicrous when they resort to using cartoon figures in childhood fantasies.

Canada has banned tobacco advertising and raised taxes on cigarettes and has logged a 30 percent decrease in adult smoking. Clearly America must ban advertising an addicting, cancer causing drug if we are to convince children that this product is in fact dangerous to their health. As Dr. Koop so clearly put it, "Tobacco is the only product that, when used as directed, kills the user."

Finally, let me conclude that I support the findings of several studies that show for adolescents, cigarette smoking is a gateway drug to illicit drugs such as marijuana and crack cocaine.

By gateway drug I do not just mean that cigarettes are the first drug young people encounter, alcohol is. But unlike alcohol, which is first experienced in a social ritual such as church or an important family event, cigarettes are the first drug minors buy themselves and use secretly outside the family and social institutions.

Cigarettes are also a facilitator for the illicit drugs. Adolescents have a very difficult time deeply inhaling and holding harsh marijuana smoke in their lungs without fist becoming accomplished cigarette smokers. Cigarette smoking conditions the throat and lungs for the irritating marijuana and later crack cocaine and ice smoking. A new heroin user for example will often smoke, (or "chase the tail of the dragon", in street terms), before they start shooting up. But unlike heroin, crack, or ice, a new user can not become intoxicated on marijuana from just a couple puffs. It must be repeatedly deeply inhaled and held to receive the reward of "getting high." Indeed, the National Institute on Drug Abuse's National Household Survey of Drug Use finds that 92 percent of adolescent marijuana users are also regular cigarette smokers. In the thirteen years I have been a street police officer, I have never arrested a young person for possession of marijuana without also finding cigarettes.

The American people support treating tobacco as a drug similar to alcohol as demonstrated by the number of cities and states, (such as New York, Chicago, Minneapolis, and Indiana and Utah), that have banned cigarette vending machines. But with the vending machine bans comes the realization that vending machines are just a small part of the tobacco access problem. DePaul University found that vending machine sales account for only 3 percent of tobacco sales to minors. Retail merchants account for 74 percent of cigarettes to minors with gasoline stations being the most frequent offender. Therefore tobacco license laws modeled on the Woodridge, Illinois experience has been recommended by Secretary Louis Sullivan and have already been adopted by dozens of communities, (such as Chicago, and Indianapolis), and is pending in dozens more, (Florida, Maricopa County, Arizona,).

But as we found with liquor age restrictions, a national policy must be in place or other communities whose priorities lie elsewhere can defeat the effects of the best communities's control efforts. That is what the tobacco industry is counting on. With all the scientific information we now possess on the addictive qualities and known cancer risk, America can no longer treat tobacco as just another sundry item. The time has come to control tobacco as a drug and S. 1088 is an excellent national plan response I wholeheartedly support.

I will be happy to answer any questions the committee may have.

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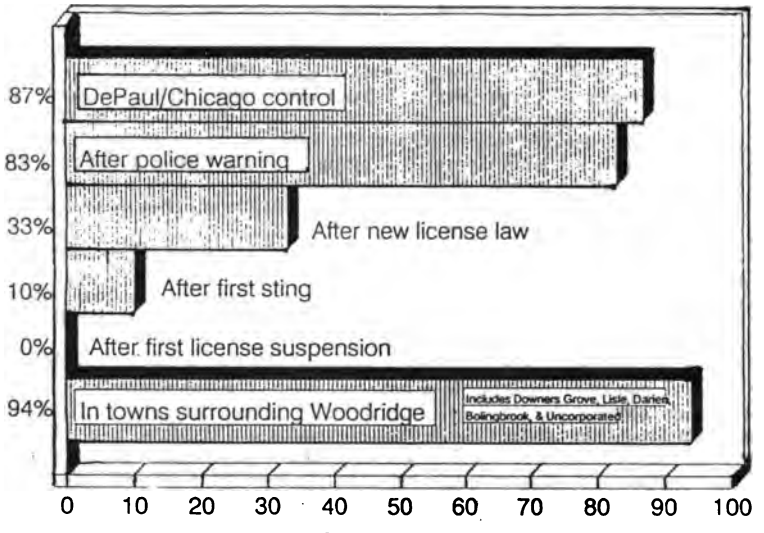
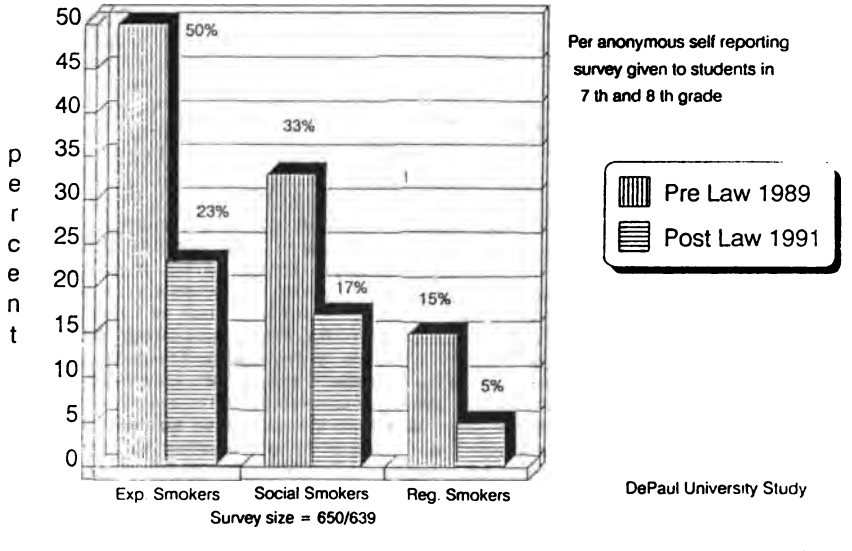
DePAUL UNIV. & WOODRIDGE PD STUDY

Cigarette Sales to 13 Yr. Olds



EFFECT OF WOODRIDGE TOBACCO LAW
BANNING POSSESSION AND PURCHASE



Senator FORD. Thank you very much, Sergeant. We appreciate you coming and testifying. Dr. Davis.

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STATEMENT OF RON DAVIS, M.D., COALITION ON SMOKING OR HEALTH, THE AMERICAN CANCER SOCIETY, THE AMERICAN HEART ASSOCIATION, AND THE AMERICAN LUNG ASSOCIATION, WASHINGTON, DC

Dr. DAVIS. Thank you, Mr. Chairman.

My name is Ronald M. Davis, M.D. and I am the Chief Medical Officer in the Michigan Department of Public Health. I am also the former director of the Federal Office and Health, part of the Center for Disease Control, a position in which I served from 1987 to April of this year.

Senator FORD. Doctor, may I ask you a question? Are you here representing Michigan or yourself as an individual?

Dr. DAVIS. I am here representing the Coalition on Smoking or Health and its three parent organizations, the American Heart Association, the American Lung Association.

Senator FORD. I wanted to be sure that you were not construed to be representing the State of Michigan.

Dr. DAVIS. I am not specifically here representing the State of Michigan. However, our State health department has endorsed the legislation that I am testifying on.

I think I did not yet mention that the American Heart Association is the third member of the Coalition on Smoking or Health. Together these organizations, the Cancer, Heart, and Lung Associations, represent over 5 million dedicated volunteers, volunteers whose sole goal is to keep America healthy.

We are here in full support of Senate bill 1088.

I have submitted a written statement for the record, but what I would like to do in the next several minutes is to review for you some of the provisions of Senate bill 1088 and comment on them.

First of all, I would like to start off with a few remarks on the health impact of cigarette smoking in the United States. Congressman Synar already pointed out that cigarette smoking is responsible for 434,000 deaths each year in the United States. What he did not do was to put that into a little bit of perspective. That is more than 1,000 deaths every day. It is one-sixth of all deaths in this country. It is more than the combined number of deaths from alcohol, cocaine, heroin, suicide, homicide, motor vehicle accidents, and AIDs. The combined number of deaths from all those causes is less than the toll from tobacco.

I think Congressman Synar also mentioned the economic impact of these diseases on our society—$52 billion a year from health care costs and lost productivity, according to the Department of Health and Human Services; $65 billion a year, according to the Office of Technology Assessment. Those are 1985 figures, which certainly are much higher today.

If current smoking patterns continue, 5 million of the children now living today will ultimately die of diseases caused by smoking.

This bill would create a new Center for Tobacco and Health at the Centers for Disease Control. The main justification for this is that the CDC's Office on Smoking and Health, of which as I said, I served as director for 4 years, has had a budget of $3.5 million a year for the last 8 years. That budget has been flat. It has dropped by one-half in real terms during the last couple of decades.

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And although the budget of that office is being doubled this year, that will do nothing but make up for recent years of inflation.

The bill would create a national information campaign on tobacco and health with an authorization of $50 million. I would note that that is about the amount of money that the tobacco industry spends in 1 week advertising and promoting this deadly, addicting product. The campaign would target high-risk populations.

We have heard about how everyone in America supposedly knows about the risks of smoking. But that is not the case first and foremost among high-risk populations that would be addressed by this national information campaign, such as those with less education, minorities, and blue-collar workers. To give you one figure, of pregnant women who have no education beyond high school, 50 percent smoke cigarettes during their pregnancy. That is a scandalous figure that we need to address.

Let me just move on to the issues that this committee is most particularly interested in. On the issue of minor's access to tobacco, Officer Talbot already commented on that. Let me just make one point in response to the industry's voluntary efforts. I have never, ever seen one of the signs that the tobacco industry referred to at the point of sale. I have never seen the tobacco industry support the type of licensing approach that works in Woodridge, that is working in King County, WA, and that is working in several other communities around the country.

In the area of disclosure of cigarette additives, I would just note that tobacco is exempt from most of the consumer protection legislation in this country. It is exempt from the Consumer Product Safety Act. It is exempt from the Toxic Substances Act, from the Fair Packaging and Labeling Act, from the Hazardous Substances Act. And the FDA has determined administratively that tobacco is exempt from the Food, Drug, and Cosmetic Act.

It makes no sense to exempt this product, a deadly, addicting product, the most important preventable cause of death in our society from any meaningful regulation. One type of meaningful regulation would be to disclose to consumers what is in the product they are buying.

Let me just conclude by addressing the issue of local advertising restrictions and elimination of the Federal preemption. Mr. Bell pointed out that censorship is addictive, but I would point out that when cigarette advertising was banned from TV and radio, we did not see any slippery slope of bans on the advertising of other legal products from TV and radio.

Advertising, as we have heard, for cigarettes is deceptive. It is seductive. It is appealing to youth. The voluntary codes that the industry talks about so much are mostly honored in the breach. States and localities ought to have the right to restrict advertising as they see fit.

I would note in closing that that is already happening to some degree. San Francisco, Denver, and Boston have all banned tobacco transit advertising. Utah has banned tobacco billboards. And a couple of dozen cities have banned tobacco sampling.

We think that the Federal preemption ought to be eliminated so that more States and local jurisdictions will take these steps.

Thank you.

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[The prepared statement of Dr. Davis follows:]

PREPARED STATEMENT OF RONALD M. DAVIS, M.D.

Mr. Chairman and members of the Subcommittee, my name is Ronald M. Davis, M.D. I am the Chief Medical Officer of the Michigan Department of Public Health and the past Director of the Federal Office on Smoking and Health. Today I appear before the Subcommittee on behalf of the three largest voluntary health organizations in the United States: the American Cancer Society, the American Heart Association, and the American Lung Association. Together, these organizations, united as the Coalition on Smoking or Health, represent over 5 million dedicated volunteers—volunteers whose sole goal is to keep America healthy.

As you may know Mr. Chairman, our organizations are in full support of S. 1088. We believe that we need to do much more in the area of education and regulation of tobacco products, if we are going to have any significant impact on this nation's leading preventable cause of death. S. 1088 would establish the necessary framework to make that goal a reality.

For the next several minutes I want to concentrate on why this legislation is so desperately needed.

In spite of what the tobacco industry claims, and in spite of the fact that tobacco products account for approximately 434,000 deaths each year, these deadly products are the least regulated consumer products in the United States. For every hour that passes, over 50 people will have died in the United States from cigarette smoking. They will continue to die until the United States Congress acts, and acts decisively.

Mr. Chairman, the lack of regulation and control over the manufacture, distribution, sale, labeling and advertising of tobacco products are historical, economical, and political. They are anything but logical.

Tobacco products have been exempted from every major health and safety law in the United States, including the Consumer Product Safety Act, the Toxic Substances Act, the Fair Packaging and Labeling Act, and the Hazardous Substances Act and by administrative determinations from the Food, Drug and Cosmetic Act.

The tobacco industry has the most irresponsible corporate record in America. This is an industry which still refuses to acknowledge the incontrovertible scientific fact that their products cause cancer, heart disease and emphysema.

Mr. Chairman, I want to address what we view as a number of major areas in need of Congressional action—many of which are contained in the legislation, some of which we hope will be added as this bill moves through the full Senate.

As I stated, tobacco products have unfortunately been exempted from major health and safety laws in the United States. We think that that needs to be changed. Tobacco products need to be regulated as we regulate other products that present potential health and safety risks to the public, such as foods and drugs. In the case of tobacco, it isn't just a potential risk, it is a serious and well established risk.

Isn't it ironic that in spite of the fact that tobacco contains nicotine, a drug described by the Surgeon General as addictive as cocaine and heroin, we are powerless to control its use in cigarettes and other tobacco products? Isn't it ironic that this addictive substance, when not used in cigarettes, is in fact strictly regulated by the Food and Drug Administration, and has resulted in products, actually less harmful than tobacco, being banned from sale in the market place?

Isn't it a travesty that in addition to the fact that tobacco in and of itself kills, the tobacco industry is under no regulatory constraints from adding hundreds, if not thousands, of chemical additives to tobacco? Not only does the public not know what is being added to tobacco products, no federal agency monitors whether these additives, when burned, can be harmful or even deadly. No government agency has any authority to require the public disclosure of these additives, or the authority to remove additives, found to be harmful. The industry's argument of "trade secrets" is merely a smokescreen. If the FDA can require disclosure of additives in foods, then surely similar requirements can be applied to disclosure of ingredients in tobacco.

Isn't it a travesty that the FDA has the authority to remove cancer causing additives in foods, and the federal government is powerless to do anything for a product that causes well over 125,000 lung cancer deaths alone each year?

It is well accepted that the industry uses low-tar and nicotine advertising and promotion to convince smokers and nonsmokers alike that these products are somehow "safer," "healthier," and less addictive.

We are distressed that the industry has been free to make these implied claims about their products without any requirements of substantiation. While touting claims of reduced "tar" and "nicotine," the industry does nothing, nor is it required, to tell the public about the 4,000 chemicals in tobacco smoke. The 1989 Surgeon

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General's Report noted that some 43 carcinogens have been identified in tobacco smoke.

To put this lack of federal control over the health and safety of these products into further perspective, we've all seen and heard of the imminent health threats from Chilean grapes containing cyanide and Perrier water tainted with benzene and the immediate reactions by the federal government to protect our health. Both of these substances have been identified, and in greater quantities, in tobacco smoke, but the government has been powerless to act. Even Philip Morris recognizes the tragic inconsistency. An internal 1959 Philip Morris document, released in a tobacco litigation suit notes,

> "if the food and drug laws were ever applied to cigarettes, certain constituents like arsenic and other insecticides and certain minor smoke constituents might have to be regulated."

And again in 1963, another internal memo to the Philip Morris research director notes:

> "We believe the next medical attack on cigarettes will be based on the co-carcinogen idea. With hundreds of compounds in smoke, this hypothesis will be hard to contest."

In spite of Philip Morris' fears and in spite of over 20 years of attempts to bring tobacco under federal government control, these health related concerns remain unregulated and unresolved. It's clearly time for Congress to bring tobacco under a health and safety regulatory scheme.

I want to now turn my attention to another area of great importance, the advertising, promotion, distribution and sale of tobacco products targeted at children, women and minority populations.

These are areas which also warrant immediate action on the part of the Congress. For too long, we have listened to the tobacco industry assure us that they don't want young people to smoke; that their advertising is aimed merely at brand switching; that they don't sample or market to children; that they adhere to voluntary advertising, regulatory and sampling codes adopted in 1964; and that somehow, because we in the health community are concerned about their targeting and marketing strategies aimed at women and minorities, we are sexists and discriminatory. This is an industry which thinks that somehow they can "buy" the Constitution and Bill of Rights with their corporate profits, and then convince us that they want to protect our rights as individual citizens. One has to ask whose rights are bring violated.

- Does, and should, an industry have a right to kill 434,000 Americans each year for the sake of billions of dollars in profits?
- Does an industry have a right to advertise, promote, and hand out samples of a product that is as addictive as cocaine and heroin?
- Does an industry have a right to target children with misleading advertising that suggests that the product will somehow make one more successful, sexually attractive, athletic and sophisticated?
- Does an industry have a right to not disclose to the public what it is putting in its products in the form of potentially dangerous additives?

I would say, doesn't the public have a right to be protected from these and other abuses by the tobacco industry.

To borrow a phrase from one of the industry's own propaganda campaigns, we say "Enough is enough."

Contrary to the claims of the tobacco industry and its allies, the advertising, promotion, and marketing of tobacco products constitutes a health threat to the American public. These practices encourage people to begin to smoke, and to continue to use tobacco as well. We've seen it in the United States, and now we are seeing it in the Asian markets, where the industry is demanding that it be allowed to advertise and promote its products to populations, such as women and children, who historically have not smoked. The argument against the industry's ludicrous claim that advertising merely promotes brand switching is best expressed in a quote from Emerson Foote, a former Chairman of the Board of McCann-Erickson, one of the world's largest advertising agencies:

> "The cigarette industry has been artfully maintaining that cigarette advertising has nothing to do with total sales. This is complete and utter nonsense. The industry knows it is nonsense. I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every other product, somehow miraculously fails to work for tobacco products."

In January of 1989, experts met in Houston, Texas to discuss and make recommendations to the Bush administration and the Congress on what we viewed as the most important policy goals related to tobacco and health. In addition to some specific recommendations on the need to regulate tobacco additives, and constituents which I have already mentioned, the conference recommended the following:

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• The establishment of a federal minimum age of 21 for the purchase of tobacco products, coupled with strong enforcement authority at both the state and federal levels.

• The prohibition of all tobacco sampling, distribution of discounted products and "couponing."

• A ban on the sale of tobacco products through vending machines.

• The elimination of brand name promotions, including brand name sponsorships, the display of brand names in connection with events open to the general public, the placement of brand names or logos on any consumer products, including but not limited to hats and tee shirts, sports cars and other sporting equipment, and the payment of any money to any other person to engage in any practice prohibited by this provision.

• A ban on all tobacco-related advertising in locations where sports events are held.

• A limit on all remaining tobacco advertising to a "tombstone" format, as follows: "No human figure or facsimile thereof, no brand name logo or symbol, and no picture other than the picture of a single package of the tobacco product being advertised displayed against a neutral background, shall be used in any tobacco product advertisement, provided that the product package displayed shall be no larger than the actual size of the product package and shall contain no human figure or facsimile thereof, no brand name logo or symbol and no pictures."

• The ads should be restricted to black print on white background, with type size and typeface of the warning label. The tombstone restrictions also should apply to all tobacco packages. At a minimum the text on tobacco packages should contain and be limited to brand name, ingredients, "tar", nicotine, and carbon monoxide levels, corporate name and any other governmentally mandated information.

Many of those recommendations are contained in S. 1088.

Mr. Chairman, I want to put today's hearing, and the legislation being considered, into perspective. In 1964, 25 years ago, Dr. Luther Terry released the first Surgeon General's Report on smoking, implicating cigarette smoking as a cause of cancer.

Fearful that their products could undergo regulatory controls or even be banned, the industry did what they continue to do so well today: they put up a smokescreen by offering up voluntary advertising, promotional and sampling codes designed to give the public and the government the impression that they are a responsible industry. For 25 years, there has been nothing but example alter example of violations of these codes.

The codes were purportedly developed to prohibit advertisements and sampling practices aimed at persons under the age of 21, as well as assuring that unproved and unsubstantiated health claims were not made. Mr. Chairman, I would like to submit for the record copies of the industry's codes.

In 1964, the industry readily and openly acknowledged that promotion efforts which related cigarette smoking to "sophistication," "sexual attraction," "success," "social prominence," and "athletic ability," were in fact advertisements which appealed to young people. They also stated that they would not use cartoon characters. The industry's code further required that advertisements should not suggest that a person's attractiveness or good health is related to cigarette smoking.

To this day, the tobacco industry has claimed that it has adhered to these unenforced codes. Advertisements attached to our statement clearly show they have not and, we submit, never will until Congress acts to prevent this type of advertising. Yet, they have repeatedly acknowledged to Congress and the American public that the themes contained in these advertisements are in fact aimed at young people and do encourage young persons to smoke. To quote the former Chairman of the Tobacco Institute, Edward Horrigan, at a hearing before Congress in 1982:

> "In 1964 we adopted a cigarette advertising code prohibiting advertising, marketing, and sampling directed at *young people* * * * each company still adheres to the principles of this Code. " (emphasis added)

I think, Mr. Chairman, this long-standing admission of 25 long years speaks for itself. Isn't it ludicrous and hypocritical that, now faced with the prospects of congressionally mandated restrictions on advertising, the industry changes its mind alter 25 years and says "no, advertising and promotion that carry such themes do not encourage young people to smoke, they merely are aimed at brand switching."

I should point out also, Mr. Chairman ad members of the Subcommittee, that the National Commission on Drug-Free Schools, in a report issued just one year ago, reached the same conclusion:

> "Voluntary advertising codes that limit youth-oriented images that can be used in alcohol and *tobacco* advertising are not being followed * * * the alcohol and tobacco industries are attempting to persuade young people that drinking and smoking are socially acceptable and more attractive than they otherwise

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might assume. In sum, alcohol and cigarette advertising are powerful forces designed to create a new generation of drinkers and smokers." (emphasis added)

Mr. Chairman, the point is that we have not really made much progress—we're exactly where we were on this issue 25 years ago. It's time we stop waiting for this industry to do what it has said it would do for 25 years. In that period of time, from 1964 to today, Mr. Chairman, millions of people have died from smoking cigarettes. How may more are going to die while we debate the same old issues again and again as if they've never been discussed?

We believe it is time for the Congress to get on with its business in properly regulating tobacco products.

While S. 1088 does not specifically address the issue of prohibiting or restricting tobacco advertisements, I want to take the opportunity to discuss what the Supreme Court has said about the issue because clearly some of the other witnesses here today are focusing on this issue. We've heard all of the arguments on both sides of the First Amendment. We know what the Supreme Court said in *Central Hudson Gas & Electric Corporation* v. *Public Service Commission of New York,* in *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico* and, most recently, in *Board of Trustees of the State University of New York* v. *Fox,* or the so-called *Tupperware* case.

In *Posadas,* Justice Rehnquist wrote, on behalf of the Court, that if a legislature has the power to prohibit certain conduct—such as cigarette smoking—then it also has the power to take the less intrusive step of allowing the conduct but reducing demand for the conduct through restrictions or bans on advertising for it.

Writing for the majority in the *Tupperware* case. Justice Scalia elaborated on this:

> "[W]hile we have insisted that the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing * * * the harmless from the harmful,' * * * we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100 percent complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. *What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect. but reasonable. that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.' * * * Far from eroding the essential protections of the First Amendment. we think this disposition strengthens them. To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." (emphasis added)*

The *Tupperware* case, Mr. Chairman, strongly reaffirms the conclusion of the earlier decision in *Posadas.* Two things contained in the excerpt from Justice Scalia's opinion are clear. One, within broad limits, it is the U.S. Congress which has the authority to determine what the restrictions on commercial speech are to be. Two, the restrictions must only be "reasonable" to do everything we can to discourage smokers and non-smokers alike from taking up the addiction or prolonging their addiction when this product is ding 434,000 Americans each year.

Isn't it reasonable to restrict or prohibit advertising and other promotional practices of this addictive, killer product when it is promoted with themes that imply that with its use comes success, attractiveness, athletic ability and sexuality? Isn't it reasonable to restrict or prohibit its advertising when we know that at least 3,000 children are trying cigarettes for the first time each and every day and that cigarettes often serve as a gateway to other drug abuse problems? Isn't it reasonable to restrict advertising and promotion of these deadly products because of the tobacco industry's flagrant failure to take voluntary actions is promised 25 years ago?

Obviously, Mr. Chairman, the answer has to be yes. By restricting tobacco advertising we are not embarking on a "slippery slope" as the industry and its allies claim. Tobacco is, first of all, a unique product in our society, one that, as I mentioned, would have been banned by the Congress a long time ago by other health and safety statutes, except for the fact that the industry, through its political might, over the years has been able to have it excluded from such laws as the Consumer Product Safety Act, the Toxic Substance Act and the Hazardous Substances Act, to name a few.

Secondly, it is the Congress who must carefully assess, on a product by product basis, which products warrant restrictions in advertising and promotion. And, Mr. Chairman, the Congress has already done this on numerous occasions. We are not breaking "new" ground in recommending the regulation of tobacco advertising. Congress gave the FDA the authority to regulate the advertising of drugs and, in certain instances, food—both obviously legal products.

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In the case of prescription drugs (and one can easily argue that tobacco products are drugs), the Congress' and the FDA's rationale for restricting their advertising, promotion and sale is obvious. Failure to do so would encourage their use—tantamount to drug pushing. Can you imagine allowing Valium to be advertised in a similar fashion to tobacco products? I can see it now: the Virginia Slims woman says, "I've come a long way, baby. I calm down and relax with a Valium, and you should too." Isn't it reasonable that tobacco products be held to at least the same standard as other legal drugs?

The tobacco industry and its advertising allies will undoubtedly use in their testimony, as they have done on other occasions, the quote from the Surgeon General's 25th Anniversary Report, which states:

> "there is no scientifically rigorous study available to the public that provides a definitive answer to the basic questions of whether advertising and promotion increase the level of tobacco consumption."

What they conveniently fall to note is what the paragraph goes on to say:

> "the most comprehensive review of both direct and indirect mechanisms concluded that the collective empirical, experimental ad logical evidence makes it more likely than not that advertising and promotional activities do stimulate cigarette consumption."

I would like to include into the record as part of our testimony the entire statement made by C. Everett Koop, M.D. at a hearing before a House Subcommittee in which he discusses at length the manipulation of the Surgeon General's report by the tobacco industry and its allies.

In all of the debate over whether advertising affects consumption of a product and encourages people to use that product, we seem to have also forgotten what the Supreme Court has said about the level of proof needed. In both the *Central Hudson* and *Posadas* cases, the Court, with little discussion or fanfare, acknowledged that advertising serves to increase demand for the product. In *Central Hudson*, the Court stated:

> "The State's interest in energy conservation is directly advanced by the Commission Order at issue here. *There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase sales.*" (emphasis added)

And in *Posadas* the Court again applied a "common sense" approach with respect to the effects of advertising on the demand for a product, stating:

> "Step three asks the question whether the challenged restrictions on commercial speech 'directly advance' the government's asserted interest. The Puerto Rico Legislature obviously believed when it enacted the advertising restrictions here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. *We think that the legislature's belief is a reasonable one, and the fact that the appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.*" (emphasis added)

Applying this "common sense" approach used by the Court in *Central Hudson* and *Posadas*, it is easy to reach a conclusion that cigarette advertising serves to increase and maintain demand for the product. Otherwise (paraphrasing *Central Hudson* and *Posadas*), why else would the industry fight as hard and oppose a ban if advertising didn't promote the use of the product?

The tobacco industry agrees, but in rhetoric only, that children shouldn't smoke or use tobacco. But it knows that it is in the youth market that it has its greatest opportunities for the recruitment of new smokers. According to the Surgeon General Report, 25 percent of high school seniors who have ever smoked had their first cigarette by sixth grade, one-half by eighth grade. We must therefore, step up our efforts to ensure that our nation's children, 3,000 of whom try cigarettes for the first time each day, do not have access to these deadly products and are better educated about the dangers associated with them. We need to ensure that tobacco products become a part of this nation's drug and alcohol education strategies.

Mr. Chairman, clearly we have a lot to do, a lot to catch up on, on all fronts, in our battle against this major killer. While we spend billions of dollars to fight illicit drug use, the Office on Smoking and Health's budget remains at a low level of less than $10 million. The tobacco industry spends almost twice as much in one day to promote the use of tobacco as the Office of Smoking and Health spends in an entire year.

The tobacco industry and its allies will find fault with every and all provisions of any legislative proposal that would effectively accomplish the goal of reducing tobacco consumption in this country. They will argue that they are voluntarily implementing programs and advertising and sampling codes designed to discourago chil-

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dren from smoking, and that legislation is therefore unnecessary. It is, unfortunately, a game they have been playing (and playing well) for over twenty-five years. For years they have been winning. Winning legislative battles which forestalls significant attempts at regulation while at the same time making huge economic profits. It is the American public who has been the loser.

It is time for Congress to put an end to these unnecessary deaths. Passage of S. 1088 will help accomplish that goal. Thank you.

[The "Cigarette Advertising Code" may be found in the committee's files.]

Senator FORD. Thank you, Doctor. Mr. Slobodin.

STATEMENT OF ALAN M. SLOBODIN, PRESIDENT AND GENERAL COUNSEL, LEGAL STUDIES DIVISION, WASHINGTON LEGAL FOUNDATION, WASHINGTON, DC

Mr. SLOBODIN. Thank you, and the subcommittee, for the opportunity to present what I would call a constitutional impact statement about this legislation.

The Washington Legal Foundation is a national nonprofit public interest law group. We have over 120,000 members. We are not a lobbying organization. Therefore, we are not taking a position on this legislation. We do want to make some observations, though, about what we feel would be provisions in this bill that would seriously harm first amendment values and principles.

At the beginning of my written statement I did summarize five reasons to support this conclusion. One has already been discussed and that is the de facto advertising ban. I think that would occur if this legislation were enacted. That would happen because of the section 2757 that would allow for a patchwork of State and local regulation restriction of tobacco advertising and also because of the clarification in the preemption on the warning requirements. You would have State judges and juries imposing all sorts of requirements, et cetera.

I have also indicated that there are some other provisions that have not received some discussion that I do think raise very serious constitutional questions. But before I get to those, I did want to point out that the Canadian ad ban decision has been raised and reemphasize that in that case that just about every, as far as I am aware, every study that had to do with the relationship between advertising consumption was reviewed in that case.

It was a 13-month trial and they had a lot of expert witnesses, a lot of studies, and the leading study that was used, the New Zealand study, was discredited in that decision. I think that is important because of the findings, in this bill, which seem to be quite lacking and not supported by the evidence and especially in light of this Canadian ad ban decision I would suggest that without that evidence, to the extent that there are objections raised because of the commercial speech protections that use the Central Hudson test, this would raise an insurmountable problem because under that test one of the requirements would be to show that the restriction, or the proposal would directly advance the substantial governmental interest.

There is no evidence, preponderance of strong evidence, that would indicate this would occur with this legislation and that would be a constitutional defect. Let me talk about that outside the advertising ban.

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Some of the other objections that we have in some of these provisions—one has to do with the labeling requirements which require that the warning labels be placed on the front and back panels and take up 20 percent of the space on each panel. I think this raises the issue and starts to get into the area of intrusive warning requirements, and there is judicial support for the position that where the warning requirement starts to take over too much of the package or in effect we are having the advertiser of the product say do not buy this product, that that runs afoul of the first amendment.

There is a case I would appoint to the attention of the subcommittee, *Memphis Publishing Co.* v. *Leech,* where a statute requiring newspapers to publish a warning 30 percent the size of their liquor advertisements violates the first amendment. In addition, we have a written article from a law professor, Daniel Polsby at Northwestern. We are examining the provision in this bill and concluded that there was a first amendment problem with respect to the labeling requirements.

I would now like to also raise an issue regarding domestic propaganda because there are two sections in this bill that would permit this spending of Federal moneys for antitobacco advertising campaigns or public information campaign and at this point I would like to mention—one of the leading constitutional scholars, Prof. William Van Alstyne has voiced objections to this legislation on those grounds. His belief, and he is supported by a number of legal scholars, is that the first amendment disallows domestic partisan ideological speech under official Government auspices in the United States. Such partisan speech of Government, by Government, threatens the integrity of the political process and ultimately the underlying principles of our system of democratic self-government and here, what this would happen, is by the Government getting to use the arsenal of its resources, it would dominate the marketplace of ideas and would interfere with the free exchange.

We are not talking about education here, we are talking about legislation; legislation that is admitted to be modeled on the California attack ads. When those attack ads vilify industry figures they have little to do, if you look at those ads, with actually educating the public about the perceived harms of the product and therefore, I would say, that raises the issue of domestic propaganda and this has been raised by Professor Van Alstyne, and is a matter of first amendment theory by other legal scholars.

Finally, I just wanted to mention there is also the issue of suppression of truthful speech and I would just recommend, again Professor Polsby's statement to that effect about the consumer being deprived of truthful information about tobacco products.

Finally the provisions on jawboning which authorized the Secretary of HHS to provide information to filmmakers and people in the media about how tobacco products ought to be portrayed. Again, I think this is an inherently coercive kind of system and again would raise first amendment problems and we are imposing I think a certain kind of political correctness in the free expression of the media in this regard. There is also judicial support for that position, and that again is in my statement and I thank the sub-

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committee for the opportunity to make these observations. In conclusion, I think this raises very serious first amendment problems.

[The prepared statement of Mr. Slobodin follows:]

PREPARED STATMENT OF ALAN M. SLOBODIN

Mr. Chairman and members of the Subcommittee, on behalf of the Washington legal Foundation (WLF), I thank you for inviting me here to testify on the First Amendment implications of S. 1088. WLF appreciates the opportunity to present its views ad commends the Subcommittee for examining the constitutional aspects of S. 1088 in this hearing.

About WLF

By way of background, WLF is a national, non-profit, pro-free enterprise public interest law ad policy center based in Washington, D.C. We are substantially supported by a membership of over 120,000 consumers nationwide.

WLF is not a lobbying organization ad thus we do not take positions—in favor of or opposition to—legislation. We do publish, litigate, ad present legal commentary bearing on proposals or laws implicating the free enterprise system, including the First Amendment. The purpose of this statement is to present, in summarized fashion, our legal assessment about provisions in S. 1088. It is our assessment, shared by some noted legal scholars including Professor William Van Alstyne, that these provisions are harmful to First Amendment principles ad values. Five reasons point to this conclusion: (1) S. 1088 would open the door to a de facto tobacco advertising ban; (2) S. 1088 would impose constitutionally suspect label requirements; (3) S. 1088 would encourage domestic propaganda; (4) S. 1088 would suppress truthful and non-misleading speech; (5) S. 1088 would authorize political jaw-boning.

Findings

Before I get into discussing these five reasons, I note that Findings 8, 10, 11 and 13 generally state that tobacco advertising increases tobacco consumption and use initiation, particularly by children These conclusions are not supported by the evidence and could cause a court to uphold tobacco advertising bans when presented with a First Amendment challenge. The Subcommittee should be aware that on July 26, 1991 in *RJR-MacDonald Inc.* v. *The Attorney General of Canada*, No. 500-05-009755-883, the Quebec Superior Court ruled Canada's tobacco advertising ban unconstitutional. That case literally put the evidence concerning tobacco advertising and consumption on trial. In the end, Justice Chabot rejected the government's argument of a connection between health protection and tobacco advertising as "tenuous and speculative," especially since it was not self-evident that smokers would quit upon the disappearance of Canadian advertising notwithstanding the permitted presence of foreign advertising. He noted that there had been no study on the impact on Canadian consumption taking into account the presence of foreign inducements, nor any study on the impact of unattributed messages. Moreover, he viewed it as illusory that eliminating tobacco advertising would even partially free the social environment of inducements for smoking since movies, books, and other "cultural icons" serve as constant reminders of the presence of tobacco. In pressing its connection argument, the government relied heavily on the Toxic Substances Board Report of New Zealand (Report) and the testimony of Dr. Jeffrey Harris in an attempt to link advertising with consumption However, Justice Chabot found that the Report was worthless because it contained "serious methodological errors and a lack of scientific rigour" with conclusions reflecting "a obvious point of view." *RJR* (English translation) at 128. Further, he found that Dr. Harris "did not demonstrate the scientific objectivity that the Court is entitled to expect from an expert witness of this stature. He often evaded questions, and frequently his answers were self-justifications." Id. at 128, 129. Justice Chabot also found that the input data used by Dr. Harris was unreliable. The strong rejection of the Report and the testimony of an important witness is significant. In particular, the Report was the most serious basis used to support the notion that advertising bans are effective and bad been cited as empirical support for Congressional proposals to ban or severely restrict advertising. In light of this case, evidence supporting the findings in question is either lacking or suspect.

De facto advertising ban

S.1088 opens the door to a de facto advertising ban in two ways. In Sec. 2757(b), S. 1088 amends the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1334, by empowering States to require additional health warnings through their common law tort systems: judges and juries in each state would be authorized to impose pen-

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alties on cigarette manufacturers for not providing health warnings on cigarette packages and in cigarette advertising in addition to those required by Federal law. State judges and juries thus would be able to do indirectly what state legislatures and state agencies are forbidden to do directly.

The result of state tort law-imposed warnings would be to Balkanize advertising regulation of a nationally marketed product and would run roughshod over the First Amendment values protected by the existing system of uniform national control over cigarette labeling and advertising. By subjecting manufacturers to potentially differing and conflicting common law warning requirements from state to state, advertising in the national media would be virtually impossible, and advertising in local media impractical at best. The Federal Trade Commission says, if different warnings are required in different states, it will be "virtually impossible to advertise cigarettes on a national basis." Chapman, "A Bigger Bullhorn for the Bureaucrats," Washington Times, July 29, 1991.

Judicial imposition of the warning requirements through the tort system, rather than by statute or regulation, is irrelevant under the First Amendment. The exercise of First Amendment rights may be burdened just as effectively by lawsuits as by legislation. See generally *New York Times* v. *Sullivan*, 376 U.S. 254, 277 (1964).

The second way S. 1088 opens the door to a de facto advertising ban is Section 2758, which would "partially repeal" the preemption provision in the Federal Cigarette Labeling and Advertising Act and authorize state and local governments to restrict "the placement or location" of outdoor tobacco product advertising and tobacco product advertising on local transit vehicles. Not only does this section eliminate the current uniform federal structure that protects First Amendment values, it also permits states and localities to regulate based specifically on its subject matter—tobacco products. Courts have upheld restrictions on the location of outdoor advertising in the past based on aesthetic concerns, but not because of its subject matter. Furthermore, anti-smoking advocates have pledged to lobby states and localities to draw wide circles around areas they consider "vulnerable" to tobacco advertising. This could, in effect, ban all outdoor and local transit tobacco advertising.

Labeling requirements

Section 2752 would mandate that federally-required package warning labels be placed on the front and back panels and take up 20 percent of the space on each panel. The government may dictate the content of product labeling to prevent it from being deceptive or misleading. See, e.g., *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,771 n.24 (1976). However, as the Ninth Circuit stated in an opinion by then Judge Anthony Kennedy, "there is no deception * * * unless the public holds a belief contrary to material facts not disclosed." *FTC* v. *Simeon Management Corp.*, 532 F.2d 708, 716 (9th Cir. 1976).

The intrusive warning label requirements are not necessary to prevent deception As Daniel D. Polsby, Kirkland & Ellis Professor of Law at Northwestern, put it: "Crepe labeling cigarettes has nothing to do with information. Everyone in this country knows about the health risks of smoking tobacco products—such has been common knowledge for generations. Millions of people have given up smoking precisely because of its much publicized dangers. Other millions of people, to be sure, have begun to smoke or have continued to smoke despite the risk—but no one has done so in ignorance of the risk. S. 1088 does not, in other words, propose that people be educated about the risks of smoking. The objective, rather, is to get people to refrain from doing what they should not want to do." Polsby, "A Case of Official Political Correctness: Anti-Industry Propaganda," 6 WLF Legal Backgrounder No. 25, at 2 (August 23, 1991). Since this format requirement is not intended to prevent cigarette packaging from being deceptive or misleading, this requirement could well be held to violate the First Amendment. Cf. *Memphis Publishing Co.* v. *Leech*, 539 F. Supp. 405, 410 (W.D. Tenn. 1982) (statute requiring newspapers to publish a warning of 30 percent of the size of their liquor advertisements violates First Amendment).

Furthermore, this provision would also set a precedent for government to impose intrusive labels on all politically incorrect products. "It is debatable whether Congress has any business telling people what they should or should not want. The traditional limit of legal coercion has been behavior, not desire. As for the behavior of smoking, few question that it is a risky vice, but many love it. And if it is legal for a person to smoke, it is certainly legal for a person to want to smoke. There is no principled reason why the Congress, if it may reprove this legal desire, may not reprove other legal desires as well." Polsby at 2.

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Domestic Propaganda

Section 2702(2) and Section 2711 would permit the spending of additional federal monies for anti-tobacco advertising campaigns. A newly established Center for Tobacco and Health in the federal Centers for Disease Control would have the responsibility of conducting a "public information" campaign to discourage people from taking up smoking, to encourage smokers to stop and "counter the messages contained in tobacco advertisements." An aide to Senator Kennedy says the model is California, which uses cigarette taxes to finance ferocious broadcast attacks on cigarette makers. Chapman, "A Bigger Bullhorn for the Bureaucrats," Washington Times, July 29,1991.

The attack ads raise the First Amendment issue of government as benign propagandist (using the power of taxation to finance persuasions toward attitudes Congress wishes the public to hold according to Congress's assessment of the best public interest). To some legal scholars, the First Amendment disallows "domestic partisan ideological speech" under official government auspices in the United States. Such partisan speech by government threatens the integrity of the political process and, ultimately, the underlying principles of our System of democratic self-government. As one scholar has stated: "[P]articipation by the government in the dissemination of political ideas poses a threat to open public debate that is distinct from government impairment of individual expression Programs of direct government dissemination and private dissemination that is government subsidized not only inform but also persuade. The government has the potential to use its unmatched arsenal of media resources and legislative prerogatives to obtain political ends, to nullify the effectiveness of criticism, and, thus, to undermine the principle of self-government. The free exercise of political rights, therefore, depends as much on a guarantee against political establishment as it does on the guarantee against interference with free speech." Kamenshine, "The First Amendment's Implied Political Establishment Clause," 67 Calif. L. Rev. 1104 (1979).

More specifically, Professor William Van Alstyne, one of our nation's most respected constitutional authorities, has criticized the arrangement proposed in S. 1088 as "an example contrary to the First Amendment principle that government propaganda systems are not to be constructed, financed, and maintained in the United States. The use of government power to direct tax-collected funds for direct, domestically-directed internal propaganda against some segment of American enterprise strikes me as new and enormously disturbing, whatever the enterprise as such. The current use of earmarked taxes in California to finance government-sponsored, professionally-crafted anti-industry TV spots that use professional actors to portray corporate boards as manipulative killers, i.e., profiteers plotting to replace cigarette-addicted persons who foreseeably die from cigarette smoking with new cohorts of victims, is a highly dramatic example of what may be done on a far larger scale pursuant to legislation now pending." Van Alstyne, "A New Free Speech Problem: Government Propaganda Against Business," 5 WLF Legal Backgrounder No. 27, at 2 (July 6, 1990).

If the government attacks the tobacco industry today, who will be the government's next target? Suppose unions are considered to be too influential. Should the Federal government spend public monies to "educate" people on the undue influence of unions? Should it authorize "public information campaigns" urging boycotts of tuna companies that tolerate drift-netting? As Professor Van Alstyne puts it, "By such reasonings, we drift to the use of the monopoly power of government to tax and to spend to propagate such views as government decides it wants its citizens to hold and to act on, as so many other deeply-resented governments elsewhere have so frequently done." Van Alstyne at 3.

Congress has prohibited the United States Information Agency and the Voice of America from disseminating their propaganda domestically. See 22 U.S.C. secs. 1461, 1461-1a. It should not depart from that principle.

Suppression of truthful speech

Section 2761(6) defines "misbranded" to mean that the labeling of a tobacco product is "false or misleading in any particular way," and a tobacco product cannot be sold if it is "misbranded." Antismoking activists would argue that S. 1088 prohibits cigarette manufacturers from labeling their products as "smooth" or "mild" or "low-tar," or to use pictures, symbols, colors, or logos. Speech that is truthful and non-misleading is constitutionally protected. "Prohibiting the statement that a given product is 'low-tar' when it actually is in comparison with some generally recognized comparison set, or lower in tar than some other product, would therefore violate the First Amendment. * * * Quite possibly the customers of 'low-tar' cigarettes are mainly people who prefer them, not to strong cigarettes, but to quitting smoking entirely. Such people are constitutionally entitled to truthful, non-misleading informa-

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tion about the relative pathogenicity of tobacco products. It is not a fact that tobacco products are indistinguishable on this dimension." Polsby at 3. See, e.g., *Central Hudson Gas & Electric Corp.* v. *Public Service Commission,* 447 U.S. 557 (1980) (Supreme Court struck down the Commission's ban on advertising (it was trying to promote energy conservation); "The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order * * * must be invalidated.").

Jawboning

Section 2702(3) authorizes the Secretary to provide information to film makers, broadcast media managers and others "regarding the role of the media in promoting tobacco use." Jaw-boning, sometimes called "regulation by raised eyebrow," is purposeful governmental interference in the constitutionally protected speech of the mass media. It is one thing for government officials to speak out on an issue but quite another for the government to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943). Such action would chill expression protected by the First Amendment—effectively imposing a system of prior restraint on speech deemed to be insufficiently opposed to smoking. Professor Polsby explains how such a system would operate under S. 1088: "[I]t is inherently coercive for the government to request or demand cooperation from a private citizen, even when no explicit sanction for recalcitrance is provided. It must be remembered that 'broadcast media managers' are federal licensees, or work for licensees, who might suppose that they were being asked to cooperate and not on a simply voluntary basis. Even for non-licensees, an atmosphere of coercion might well be presumed. In a world in which the public sector expands each year, and in which artists, writers and moviemakers are annual recipients of tens of millions of dollars of federal largess, the inference that it was Big Brother calling, rather than HHS, might well be natural. The message will be: America expects every producer to do his duty. Of course—perish the thought!—no one would actually demand that a producer airbrush the offending frames from a filme noire, replacing a package of Luckies with a roll of wintergreen Lifesavers. Still, the government is 'authorized' to 'provide information' on the contribution that these steps might make to suppressing tobacco use. This provision comes as close to legislating politically correct thought as American legislation ever has." Polsby at 4.

In addition, Professor Van Alstyne has pointed out to me a well-reasoned federal district court decision holding that mere jaw-boning that is meant to and has the effect of persuading a publisher to steer away from accepting scripts which but for that jaw-boning, they would have accepted is actionable by the adversely affected writers under the First Amendment. See *Writers Guild of America* v. *FCC,* 423 F. Supp. 1064 (C.D. Cal. 1976), reversed on other grounds, 609 F.2d 355 (9th Cir. 1979), *cert. denied,* 449 U.S. 824 (1980). Judge David Bazelon has also expressed the view that these kinds of government agency influences were inconsistent with First Amendment restraints on government. Bazelon, "FCC Regulation of the Telecommunications Press," 1975 Duke L.J. 213.

Conclusion

In this 200th anniversary of the ratification of the Bill of Rights, the First Amendment has come to mean newspapers that everyone can buy on a street corner, newspapers that can say almost anything about anybody, and even advertisements that can say almost anything as long as it's truthful. The First Amendment has also come to be meant as a Fran bartier against imposing, collecting, and spending taxes to fuel government-directed domestic propaganda services meant to dominate the marketplace of ideas in the United States. I am not suggesting that S. 1088 would turn the United States into China or what was the Soviet Union But, as Stephen Chapman wrote, it would put us a little closer to these countries than a free society ought to be.

Thank you for the opportunity to testify.

Senator FORD. Thank you very much. I am being pressed a little bit for time here since my good friend, Senator Gorton had to leave, I think it is in the best interests that I submit written questions to the witnesses here and hope that you will respond to those in a timely manner.

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Therefore, I call this hearing adjourned.
[Whereupon, at 11:25 a.m., the subcommittee adjourned.]

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APPENDIX

PREPARED STATEMENT OF THE CIGAR ASSOCIATION OF AMERICA

The Cigar Association of America (CAA) appreciates the opportunity to present its views on S. 1088 (The Tobacco Product Educational and Health protection Act of 1991). These comments are limited to the provisions of the bill as they pertain to the U.S. cigar industry, whose annual sales in 1990 were about $695 million, representing less than 2 percent of all tobacco products sold in the United States.

The CAA opposes the broad scope of S. 1088. The "Findings" upon which the bill is premised present fundamentally inaccurate and misleading information to the public and do not differentiate among tobacco products. The fact of the matter is that there are considerable differences among tobacco products—in how they are used and how they are marketed, for example. Legislation that purports to promote greater public awareness of matters related to smoking should be based on accurate, objective data.

The avowed purpose of S. 1088 is "to encourage cessation of tobacco use" among young people and to strengthen laws limiting sales of tobacco products to minors. The cigar industry firmly supports the principle that cigar smoking is an adult custom based on mature and informed judgment. Objective data clearly demonstrates that cigars are not youth-oriented products. The U.S. market for cigars consists of adult males who have the maturity to make informed, responsible decisions about cigar smoking.

Typically, those who smoke cigars begin to do so when they reach their 30s. Moreover, the cigar industry disapproves of advertising designed to encourage cigar smoking by those under 21 years of age. That principle is set forth in the CAA's Cigar Advertising Standards.

The average cigar smoker smokes 2 cigars per day. According to the Bureau of Alcohol, Tobacco and Firearms, cigar sales have declined 68 percent in the past 20 years. The total advertising and promotional expenses of the cigar industry are less than one half of one percent of the figure cited in the "Findings" in S. 1088. The cigar industry spends the vast majority of these expenses on point-of-purchase materials.

In addition to our objections to the unjustified treatment of cigars in the bill, we wish to bring to the committee's attention that there is no recognized testing methodology for measuring the constituents of cigars or their smoke (as distinguished from other tobacco products). This is true internationally as well as domestically. Nevertheless, the bill would impose a requirement on cigar manufacturers to state the quantities of named constituents to a federal agency. Absent a standardized test, the cigar data generated by this requirement would be unreliable and virtually useless.

This hearing has given us the opportunity to inform the committee why S. 1088 is not appropriate where cigars are concerned. For the reasons outlined above, we believe cigars should be excluded from the scope of the bill.

LETTER FROM SENATOR KENNEDY TO SENATOR BRYAN

NOVEMBER 25, 1991.

Senator RICHARD H. BRYAN,
U.S. Senate,
Washington, DC 20510

DEAR SENATOR BRYAN: I have received the enclosed materials from individuals and organizations who wish to comment on S. 1088, the Tobacco Product Education and Health Protection Act of 1991. They have asked to be part of the record of the November 14 hearing held by your Subcommittee on this piece of legislation.

These materials speak for themselves, but are largely a response to those who fear that any selective restrictions on the advertising of tobacco products will

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produce an abridgement of the First Amendment right of free speech. Taken together, they represent an important response to those who made this argument at the hearing.

Thank you for your efforts to ensure a balanced presentation of viewpoints at your hearing.

Sincerely,

EDWARD M. KENNEDY.

LETTER FROM JACK E. LOHMAN, INTERIM DIRECTOR, WISCONSIN INITIATIVE ON SMOKING AND HEALTH

NOVEMBER 26, 1991.

Senator EDWARD M. KENNEDY,
U.S. Senate,
Washington, DC 20510

DEAR SENATOR KENNEDY: A new twist on an old idea attacks the muting affects tobacco advertising has on the printed and broadcast media:

- While the oft-suggested 5 cent federal excise tax could provide millions of dollars which could be earmarked for anti-smoking messages in the media, what magazine or TV station would voluntarily accept such ado at the risk of offending tobacco producers (to the point that they shut off all of their tobacco and non-tobacco product advertising)? How can this editorial control be offset?

Perhaps the only way is to pass legislation that requires the media (printed and TV) to accept paid public service announcements up to a dollar amount equal to that which they receive from both tobacco companies and their non-tobacco subsidiaries. Indeed, the available "health" money would dwarf the tobacco industry's, and would never reach the total allowed. But if health ads are paid for, the media should not be able to decline them. Tying it to "tobacco only" ads should be avoided, as this effort could be nullified if a tobacco company vengefully pulled its tobacco ads but left its non-tobacco ads for leverage.

- A ban on advertising would be good, but not if it precludes the above. Such legislation should survive any future voluntary or involuntary ban on tobacco ads.
- Do RICO violations apply to the concerted stifling of competitive advertising or health articles?
- When a tobacco ad shows a cigaret without the deadly smoke being emitted from its lit end, is that considered false and misleading advertising? It certainly removes from the image of the cigaret its most feared substance—smoke.

We must find ways to combat the "heavy handed advertising which mutes vital health information from being disseminated to the public".

Sincerely,

JACK E. LOHMAN,
Interim Director.

LETTER FROM JACK E. LOHMAN, DIRECTOR, CARDIAC EVALUATION CENTER, TO SENATOR BRYAN

NOVEMBER 26, 1991.

Senator RICHARD BRYAN,
U.S. Senate,
Washington, DC 20510

DEAR SENATOR BRYAN: Recently, I had a personal experience that demonstrates the substantial power tobacco companies have over local tobacco education programs in public schools.

In addition to my capacity at CEC, I am Interim Director of the Wisconsin Initiative on Smoking and Health, an organization formed to foster tobacco education in schools and the workplace, and to promote clean air legislation in public places. I purchased a 32 minute VHS videotape which interviews several cowboys in "Marlboro Country" and a rather defensive corporate officer of the Philip Morris Company. It is a compelling film which describes the fate of these "smoking cowboys," all of which eventually died from smoking-related diseases. Philip Morris managed to suppress it in Europe, but it found its way to the United States.

I offered the film to a health official at the Milwaukee Public School System hoping they would broadcast it on their closed circuit TV system. I was told that, in essence, they may not be able to broadcast it because Philip Morris and its subsidiary, Miller Brewery, "do so much for the community and the school system" that

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they would not want to offend them. When I objected that the health and safety of the children far outweighed the political aspects, I was then told that inner city school children no longer relate to "white cowboys." I am still waiting for its broadcast.

Similarly, when I requested that the city mayor (John Norquist) not support the Philip Morris Bill of Rights tour because it was a tobacco-sponsored event designed to create a positive image for the tobacco company, I was again reminded (by a different city official) of how much Philip Morris contributes to the area. [They contributed $500,000 to the Public Museum on the eve of the tour, although few saw it as a "prepayment to acquiesce."]

It is distressing to see the producers of such a lethal product effect such firm control over the publication, distribution and broadcast of pro-health materials to our children.

Sincerely,

JACK E. LOHMAN,
Director, Cardiac Evaluation Center.

LETTER FROM JOSEPH W. CHERNER, PRESIDENT, SMOKEFREE EDUCATION SERVICES, INC.

NOVEMBER 22, 1991.

The Honorable TED KENNEDY,
U.S. Senate,
Washington, DC 20510

DEAR SENATOR KENNEDY: Smokefree Educational Services supports legislation to restrict advertisements promoting tobacco addiction.

We have attempted to place counter ads on several occasions, but our access has been denied for fear of "offending tobacco companies. For example, in 1988 we tried to run a paid advertisement in Playbill, a magazine distributed at theatres in New York City. The ad was created by an 11th grader and simply said. "If you smoke, Why? Can't you read?" There was a big Surgeon General's warning at the bottom. Playbill returned our ad and check with the enclosed letter. According to Playbill, our ad would "interfere with the theatre going experience." I called Playbill and asked if they would consider another ad. They said they would not accept any ad that offended their tobacco advertisers.

In 1990, we tried to run another student ad on the New York City subway system. Created by a 5th grader, Come To Where The Cancer Is won best print ad in the The New York City Smokefree Ad Contest. Gannett Transit, the company in charge of subway advertising, would not accept it because it would "offend their tobacco advertisers." When New York media criticized Gannett's decision, they changed their excuse and said our ad had too much white space and would encourage graffiti. The next day an ad for Merit cigarettes appeared with all white space. So Gannett changed its excuse again and said we didn't submit the proper papers. The New York Times wrote a critical editorial of Gannett's decision and Tom Brokaw ran a critical piece on the Nightly News. The president of Gannett called the next day and said they would take our ad. Subsequently Gannett said it will no longer take any more of our ads because our ads are "visual pollution." After being criticized in the press again, Gannett now says it won't take our ads because people are using bumper stickers that we produce and putting them on cigarette ads.

We have also tried unsuccessfully to buy billboard space in Shea Stadium. The Mets' contract with Philip Morris for a giant Marlboro billboard expires at the end of this year. In January, we offered to pay the Mets the same amount as Philip Morris was paying them if they would let us replace the Marlboro billboard with something good for young Mets fans. We repeated the offer in writing and in the press throughout the year. The Mets told us they would give us an opportunity to compete for that billboard space when the contract expired. The Mets recently renewed their contract with Philip Morris without ever letting us compete.

Media access is not accessible to everyone. Health groups are denied advertising access because of pressure from tobacco companies' advertising clout.

Sincerely,

JOSEPH W. CHERNER.

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LETTER FROM ARTHUR T. BIRSH, PRESIDENT AND PUBLISHER, PLAYBILL, INC., TO JOSEPH W. CHERNER

APRIL 8, 1991.

Mr. JOE CHERNER,
Anti-Smoking Educational Services, Inc.,
New York, NY 10280

DEAR MR. CHERNER, Our Rate Card "Contract and Copy Regulations1 states:

"Publisher reserves the right to exclude any advertisement which, in its opinion, does not conform to the standards of the publication."

I must always keep in mind the nature or our service, the place of distribution, and the expectations of our readers and theatre owners. We must do nothing to damage the quality of the theatregoing experience We can criticize no one or nothing. We are expected and determined to enhance and cheer not depress or hector our audience.

This is not a new policy. As an avid theatregoer you are well aware that you see no contradictions of this century-old sense of our raison-d'etre.

It is my sole and final judgment that I can not carry your advertising as it is not in keeping with our charge. I, therefore, enclose your check.

Sincerely,

ARTHUR T. BIRSH,
President and Publisher.

[New York Times, June 22, 1990]

A DROP-DEAD POSTER

Melissa Antonow is only 12 years old so it's fair to say she'll probably pick up and discard any number of career choices before maturity. But it's also fair to say that she already shows a talent for the drop-dead graphic and the strong headline. Melissa Antonow may have a future in advertising.

Melissa's poster of a skeletal cowboy is drop-dead not only because it is arrestingly drawn but because the cowboy is riding through a graveyard and above his head is her catchy slogan: "Come to where the Cancer is."

Melissa's variation on the Marlboro man's slogan ("Come to where the flavor is") won a contest sponsored by the Coalition for a Smoke-free City, and was supposed to appear in the New York subways. That at least was what the head of the coalition, Joseph Cherner, was planning. But Gannett Transit, which handles subway advertising for the Metropolitan Transportation Authority, refused the ad.

Mr. Cherner says a Gannett official, James Taggart, told him the poster might offend the company's many tobacco advertisers. Mr. Taggart says no, the problem is with the medium, not the message: line drawings like this are "graffiti-prone."

Furthermore, he adds, the poster had never been formally presented either to Gannett or the M.T.A.

The graffiti point is hard to comprehend; blacking out the star's teeth on a movie placard in the subways is a routine rite of passage. What advertising doesn't invite graffiti? In any case, a poster with such an effective and important health message warrants special attention, precisely because it is directed at the young people who ride subways—and write graffiti.

Other city agencies work conscientiously to send anti-smoking messages to the public. Surely the M.T.A., through its lessee, Gannett Transit, doesn't wish to contradict such efforts. Let's hope that Mr. Cherner will resubmit the entry with all the proper formalities—and that Melissa's message will soon be showing up all over town.

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Shea Stadium Demonstration

SMOKEFREE CLASS OF 2000 TO METS: "WHY ARE YOU PUSHING CIGARETTES ON US?"

Dressed in bright yellow T-Shirts with the words, "Smokefree Class of 2000," across their chests, 4th graders from PS 102 in Queens picketed Shea Stadium on opening day to protest the giant Marlboro billboard in left-center field.

"The Mets should be telling us to stay drugfree, not pushing cigarettes on us," read their placards.

The New York Mets responded that cigarettes are a legal product and they have a right to push them on anyone they choose.

president of Smokefree Educational Services. "And the Mets said no."

The Mets contract with Philip Morris expires this year and Smokefree Educational Services has offered to pay the going rate.

Send letters to:

[illegible]

Fay Vincent
Commissioner
Major League Base
[illegible]70 Park Avenue
New York, NY [illegible]

"You should be telling us to stay drugfree, not pushing cigarettes on us."

—Smokefree Class of 2000 to the New York Mets

"We asked the Mets if they would sit down with members of the health community just to hear our concerns," said Joe Cherner.

$240,000 a year [illegible] replace the anti-health Marlboro billboard with a pro-health [illegible] billboard more suitable [illegible] Mets fans. The Mets refused to respond.

In fact the Mets refuse to respond to Mayor [illegible] Kans, City Council Leader Peter Vallone, other City Council members, Senator Bill Bradley [illegible] New York Knick and [illegible] Against Tobacco [illegible] the Coalition For A [illegible] City and the press.

"[illegible] Cherner [illegible] trade [illegible] anything [illegible] And [illegible]

"It's [illegible] cigarettes to children [illegible] legal to advertise cigarettes [illegible] The Marlboro [illegible] targets a stadium [illegible] and is located in the [illegible] televised [illegible]

Smokefree Air, Summer 1997

PREPARED STATEMENT OF MICHAEL J. KERRIGAN, PRESIDENT, SMOKELESS TOBACCO COUNCIL, INC.

Mr. Chairman, my name is Michael J. Kerrigan and I am the President of the Smokeless Tobacco Council, Inc., an association of domestic smokeless tobacco manufacturers. I appreciate the opportunity to submit this statement, which expresses

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the views of the smokeless tobacco manufacturers on S. 1088, the Tobacco Product Education and Health Protection Act of 1991.

For those of you who may not be familiar with smokeless tobacco, it is tobacco which is intended to be used in the mouth and is available in two main varieties—chewing tobacco and snuff. Smokeless tobacco has been enjoyed in this country since it was first settled over 300 years ago. Indeed, one brand of smokeless tobacco, still a popular brand today, is one of the oldest consumer products in this country, having been granted one of the first trademarks issued by the U.S. Patent Office. Today, smokeless tobacco products are used primarily by outdoorsmen and those who work with their hands.

I. The Legislative Proposal: S. 1088

Mr. Chairman, it is the position of the smokeless tobacco manufacturers that the broad, new bureaucratic scheme contained in S. 1088 including the creation of a new Federal agency to be known as the Center on Tobacco and Health—is unnecessary, unfair, and based on false assumptions. Furthermore, the proposal would undermine the long standing principle established by Congress of regulating tobacco labeling and advertising so as to provide a uniform and consistent message to the general public regarding the tobacco and health controversy.

S. 1088 is unnecessary because current Federal regulation, particularly the Comprehensive Smokeless Tobacco Health Education Act of 1986, P.L. 99-252, (the "Comprehensive Act"), deals in an appropriate manner with most of the smokeless tobacco matters covered by the proposal. These include public education activities, reports to Congress, and the reporting and evaluation of smokeless tobacco ingredients and nicotine provided for in the bill.

Indeed, the Secretary of Health and Human Services has declared that the Tobacco Product Education and Health Protection Act is "unnecessary." In his statement submitted to the Senate Committee on Labor and Human Resources on February 20, 1990, Dr. Sullivan stated:

> Although we support the Committee's efforts to focus greater attention on tobacco and health, I believe the Department's activities—those underway and those we will be pursuing during the coming months—serve the same purpose and accomplish the identical goals as those set forth in S. 1883 [the 1990 version of S. 1088]. The Administration shares the concerns addressed by the legislation.
>
> We do not believe, however, that the additional authorizations and requirements contained in [the Tobacco Product Education and Health Protection Act] would measurably add to our current or planned efforts. Therefore, the Administration believes such legislation is unnecessary.

The Comprehensive Act represents a sweeping effort by the federal government to regulate the smokeless tobacco industry on a national and uniform basis. This comprehensive and uniform Federal law should be given adequate time to work before the American taxpayer is burdened with a new, largely redundant, regulatory scheme.

Furthermore, the array of anti-tobacco programs proposed under Subtitle B of the bill, including so-called "persuasional programs," embody proposals that do not have a proper place in a democratic society. These campaigns would be aimed specifically at "school dropouts, minorities, blue collar workers, and low income individuals" and are intended to deny these adult American citizens their informed freedom of choice as to whether to use tobacco products.

S. 1088 also seeks to undermine the long-standing federal policy of maintaining a uniform national system for regulating tobacco advertising. The bill seeks to foster a patchwork of local—and therefore inconsistent—regulations. This ill-advised aspect of the bill would threaten the carefully constructed balance struck by the Congress between regulation of tobacco products and legitimate commerce.

Finally, the proposed legislation is based on false assumptions, including the notion that tobacco advertising and promotion contribute to the initiation of tobacco use by youth.

Needless to say, Mr. Chairman, the enormous cost of erecting this new bureaucracy—$110 million in fiscal year 1992 alone—would impose an unacceptable new burden on the American taxpayer, and divert resources from the country's real needs, in this era of budget deficits and fiscal restraint.

II. Our Record on Smokeless Tobacco and Youth

Before turning to a detailed discussion of our industry's position on S. 1088, I shall focus on one concern of the bill to which the smokeless tobacco manufacturers have devoted substantial efforts and resources over some years—ensuring that smokeless tobacco products are not marketed to persons under the age of eighteen.

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Even the report of the Senate Committee on Labor and Human Resources regarding S. 1088 acknowledged our voluntary efforts. "The Committee notes," stated the report, "that the smokeless tobacco industry has also conducted a voluntary education program emphasizing that the use of their product is strictly for adults." The report concluded that the Labor Committee "is supportive of these efforts" and suggested that they be increased. The smokeless tobacco industry has responded to the Labor Committee by expanding ongoing efforts. A brief description of our voluntary youth program is provided below.

The smokeless tobacco manufacturers have adopted the Code of the Smokeless Tobacco Industry. Under the Code, smokeless tobacco manufacturers oppose any association of smokeless tobacco with activities which may be designed for persons under the age of eighteen. In particular, we do not direct our advertising or promotions toward youth, do not use active athletes or professional entertainers to endorse our products, and all models who appear in our advertisements must be at least 25 years of age. A copy of our Industry Code is attached.

In addition to these strict policies, our industry has spent considerable time and effort encouraging others to support our "adults only" policy. In 1984, only 22 states had laws mandating 18 as the minimum age for purchase of smokeless tobacco. Thanks in part to our efforts, more than 40 states now have laws establishing 18 or a higher age as the minimum age for purchasing our products. Not only do we support 18 as the minimum age of purchase, in many of these states—Colorado, Maryland, Missouri, New Mexico, New York, Pennsylvania, Texas and Virginia, for example—the Council submitted testimony and actively supported the passage of these laws.

In 1984, we began a program to encourage retailers to support our policy that 18 years should be the minimum age for purchase of our products. The Council printed and distributed point-of-sale signs to more than 50,000 convenience stores urging retailers to ask for positive identification when selling our products and not to sell them to anyone under 18, even if the laws in their states did not prohibit it.

In 1985, to reach the general public with our message, we produced a public service announcement ("PSA") entitled "Smokeless Tobacco is NOT for Kids" and released it to 300 television stations nationwide. Millions of people heard and saw this important message.

We continued to carry out this vigorous program in 1986 by means of the print media. "Some things are still for adults only" was the paid public service announcement that kicked off our 1986 program. This PSA urged those under 18 not to attempt to buy smokeless tobacco products and urged retailers not to sell our products to anyone younger than 18.

We also launched a national media campaign entitled "Because We Care." We placed open letters to America's parents, coaches, teachers and retailers urging these adult authority Figures to help educate the nation1s youth about our age of purchase policy. These messages were placed in some of the most widely circulated publications in the country including Parade Magazine and The Washington Post, as well as some key specialty publications such as Education week and Convenience Store News. In 1986 alone, we reached more than 25 million people.

From 1987 to 1988, the Council went to the local level with two new paid public service announcement campaigns concerning youth and smokeless tobacco. The first campaign—"It's Our Responsibility"—was targeted at local newspapers and featured strong parental figures discussing responsibility and the importance of parents helping to prepare their children for adult decisions. These PSAs were placed in local newspapers from coast to coast such as The (Memphis) Commercial Appeal, the Wisconsin State Journal, the Southern Illinoisan and the Tallahassee Democrat. With this PSA alone, we reached more than three million readers.

Another Smokeless Tobacco Council campaign—directed specifically at education-related print media—urged America's teachers, coaches and principals to teach youth about the "Fourth R: Responsible Decision-Making". Among the 47 publications that ran our PSAs were the nationally-circulated Education Week and Teacher; as well as West Virginia School Journal and The Arizona Administrator.

In 1989, we produced a compendium of all of the industry's youth efforts to date entitled "A Continuing Commitment." This publication was distributed to business, civic and youth organizations communicating our adults only message and asking their help in supporting our policy. The Boy Scouts of America, the Rotary Club International and the United States Chamber of Commerce are some of the nearly 100 organizations we contacted.

As a result of that effort, we worked closely with the American Legion to incorporate our adults only message into their youth outreach programs. We twice addressed their Committee on Americanism and Youth, distributed our adults only policy materials to the Legion's 50 state Commanders and more than 100 other top

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officials, and placed paid public service announcements in The American Legion Magazine. Thanks to the Legion's cooperation, our message will reach a far wider audience.

In 1990, we added some new dimensions to our program. First, we worked to further develop our programs to educate parents, retailers and other adults that the enjoyment of smokeless tobacco is an adult custom and not intended for youth. For example, we printed half a million handout cards for distribution to retailers, that detailed our "Adults Only" policy and asked retailers' help in enforcing our policy. These cards were hand-delivered to retailers nationwide by our member companies' sales forces.

Second, we extended our outreach program to include the law enforcement community. For several reasons, law enforcement officers are worthy allies in our campaign against the use of smokeless tobacco products by persons under the age of 18. For example, they are concerned, as we are, with adherence to the law, including laws that define activities which are adult customs. Even more important, they have enormous influence on youth as community authority figures, both in uniform and in the context of the youth clubs and other programs they sponsor to help guide youth into productive, responsible adulthood.

Our third goal for 1990 was to explore new ways to reach our adult consumers and enlist their help in enforcing our "Adults Only" policy. Primarily, we concentrated on publications popular with adults who enjoy smokeless tobacco, such as Outdoor Life, Field & Stream and Progressive Farmer. Not only did we place public service announcements in these magazines, we also succeeded in enlisting editorial support from these publications for our 'Adults Only" policy program.

This year, we have continued our long-standing commitment to communicating our "Adults Only" policy by launching a national paid public service announcement campaign. We placed paid public service announcements in publications which included USA Today and U.S. News and World Report.

In addition to national publications, the Council placed paid public service announcements and open letters in local newspapers, trade magazines and additional publications to spread our adults only message to a larger adult audience.

We also produced and distributed a compendium of new materials entitled "The Smokeless Tobacco Council's Adults Only Policy Program," that captures the many ways the smokeless tobacco industry has sought to communicate its "Adults Only" policy to responsible adults across the country. These materials have been distributed to teachers, coaches, parents, retailers, public officials, veterans, law enforcement personnel and smokeless tobacco wholesalers and distributors. Our belief is that if these responsible adults know and help enforce our policy, we are making a difference.

In addition to these yearly campaigns, we maintain many ongoing activities to get our adults only message out to the public. We have spoken to tobacco farmers, distributors of tobacco products and convenience store owners to explain our policy and ask their help in making it work. We have also distributed tens of thousands of pieces of literature on our policy during the course of delivering these addresses.

We also take advantage of editorial opportunities to get our message across. We regularly publish op-ed articles in trade and general interest publications to inform readers of our policy. We also make a point of setting the record straight when publications wrongly accuse our industry of marketing smokeless tobacco to those under 18. Hundreds of letters to the editor have been sent out reminding editors and their readers of our policy that smokeless tobacco is not for youth.

Our industry is proud of the efforts we are making, and we will continue our efforts to ensure that the American public understands and remains aware that our products are for adults only. (Some examples of the Council's "Adults-only" policy materials are being submitted with this statement.)

III. S. 1088 is Unnecessary and Unfair

Proponents of S. 1088 mistakenly argue that tobacco products are unregulated and uncontrolled. In fact, smokeless tobacco products are regulated by an array of federal authorities, including:

- The Department of Health and Human Services, which monitors the ingredients in smokeless tobacco products, conducts tobacco and health research and public information programs, and reports to Congress on a biennial basis regarding tobacco and health issues;
- The Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, which collects tobacco taxes;
- The Department of Agriculture, which grades and characterizes tobacco, and regulates production and prices;

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- The Federal Trade Commission, which regulates tobacco product packaging and advertising, including monitoring the use of government-prescribed warning messages on smokeless tobacco products, and reports to Congress on a biennial basis regarding the sales, advertising, and marketing practices of the smokeless tobacco industry.

These wide-ranging federal efforts are supplemented by a panoply of state and local regulatory authorities, including:

- State and municipal environmental protection agencies;
- State occupational safety and health agencies;
- State consumer protection agencies;
- State departments of labor; and
- Municipal fire marshals.

In addition to the comprehensive federal and state regulatory schemes, federal and state authorities conduct extensive educational programs as well. For example, the Department of Health and Human Services, working through the National Cancer Institute and with the assistance of the American Cancer Society, recently announced a comprehensive program to assist seventeen model states in community-based educational services regarding tobacco products. The $135 million project, called "ASSIST," will involve education efforts at worksites, in schools, and through various community groups.

Given this comprehensive federal, state, and local framework, S. 1088 is unnecessary. Indeed, it is clear that the stated "purposes" set forth in Section 2(b) of S. 1088 as they relate to smokeless tobacco products are currently fulfilled by the Comprehensive Act as demonstrated by the following summary:

- S. 1088 states that it is a purpose of the bill to "help educate citizens to prevent initiation and encourage cessation of tobacco use" and to "support State efforts to improve educational programs for the prevention and cessation of tobacco use," but such activities are already within the scope of Section 2 of the Comprehensive Act entitled "Public Education".
- S. 1088 states that it is a purpose of the bill to "inform the public about the harmful effects of tobacco products," but Sections 2, 3, 4, and 8 of the Comprehensive Act mandate health warnings for smokeless tobacco products and advertisements and provide the Secretary of HHS with a broad array of authority to undertake "informational" and "educational" programs.
- S. 1088 states that it is a purpose of the bill to "strengthen laws limiting the sale of tobacco products to minors" but Section 2(b)(3) of the Comprehensive Act provides the Secretary of HHS with authority to carry out such activities.
- S. 1088 states that it is a purpose of the bill to "provide for the determination of the risk to individual health of additives to tobacco products," to "establish Federal regulatory authority over such additives," and to "ensure the disclosure of accurate information to the public," but all of these matters are covered by the Comprehensive Act, particularly Section 4 of the Act.

Some specific examples of the redundant and unfair nature of the provisions of S. 1088 are set forth below.

A. Reporting Provisions

The smokeless tobacco reporting program of S. 1088 is unnecessary. Section 4 of the Comprehensive Act, entitled "Ingredient Reporting", already provides in part:

> (1) Each person who manufactures, packages or imports smokeless tobacco products shall annually provide the Secretary with—
>
> (A) a list of the ingredients added to tobacco in the manufacture of smokeless tobacco products which does not identify the company which uses the ingredients or the brand of smokeless tobacco which contains the ingredients; and
>
> (B) a specification of the quantity of nicotine contained in each such product.

The smokeless tobacco manufacturers strongly believe these Comprehensive Act reporting provisions adequately and appropriately serve the legitimate public interest, as determined by Congress, by providing the Department of Health and Human Services with information about the ingredients and nicotine content of smokeless tobacco products. Furthermore, the industry has cooperated fully with the Department of Health and Human Services in developing and responding to the regulatory and statutory requirements of the Act.

B. Evaluation of Ingredients

S. 1088 contemplates that the proposed Center will evaluate smokeless tobacco ingredients to determine whether they "significantly increase the risk of the product to human health." However, the ingredient provisions of the Comprehensive Act require that the Secretary of Health and Human Services report to Congress regarding scientific research on the possible health effects of smokeless tobacco ingredients

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and, in particular, that the Secretary advise Congress with regard to any smokeless tobacco ingredient which the Secretary believes "poses a health risk to users of smokeless tobacco." Clearly, the Secretary must undertake a scientific evaluation of smokeless tobacco ingredients in order to comply with this Congressional mandate. Indeed, Congressman Henry Waxman—one of the leading proponents of the Comprehensive Act—described the ingredient reporting and evaluation provisions of the Act as follows:

> "Section 4 of the legislation requires ingredients in smokeless tobacco to be disclosed to the Secretary of Health and Human Services. Such disclosure will permit more precise evaluation of the health effects of smokeless tobacco products and will enable the Secretary to warn of specific ingredients contained in smokeless tobacco that may increase the health risks of the product." Cong. Rec. Feb. 3, 1986 H 249.

Mr. Chairman, it is clear: The proposed S. 1088 ingredient evaluation requirements are unnecessary and duplicative of existing federal law. The provisions of the Comprehensive Act should be permitted to continue in effect for a reasonable time before rushing to impose new and conflicting rules and standards.

C. Reports to Congress and Public Education Activities

Sections 2728 and 2729 of S. 1088 contain proposals for public education regarding smokeless tobacco and reports to Congress by the Secretary of HHS regarding various matters relating to smokeless tobacco.

The public education provisions of Section 2728 (beginning on page 30) direct the Secretary to "establish and carry out a program to inform the public of dangers to human health resulting from the use of smokeless tobacco products" and set forth various duties which the Secretary shall undertake in carrying out the program. Section 2728 also provides that the Secretary may furnish technical assistance and make grants to the States "to assist in the development of educational programs and materials and public service announcements" relating to smokeless tobacco, and "to establish 18 as the minimum age for the purchase of smokeless tobacco." Section 2729 provides that the Secretary shall submit to Congress biennial reports containing, among other things, "a description of the effects of health education efforts on the use of smokeless tobacco products" and "an evaluation of the health effects of smokeless tobacco products and the identification of areas appropriate for further research."

While at first glance these provisions of S. 1088 regarding "public education" and reports to Congress regarding smokeless tobacco issues may seem laudable, they are totally unnecessary. Every provision contained in Sections 2728 and 2729 of S. 1088 is already part of the Comprehensive Act. Indeed, the provisions of Sections 2728 and 2729 are taken virtually verbatim from Sections 2 and 8 of the Comprehensive Act. Duplicating provisions of existing law underscores the truly redundant nature of S. 1088 and unnecessarily increases the cost to the taxpayer.

D. Unfair and Ill-Conceived Label Format

Section 2752 of the bill would impose warning labels on tobacco products which would occupy twenty percent of the two most prominent sides, and which would contain text as large as that used in other labeling on the product. This size requirement is grossly unnecessary and excessive. The Federal Trade Commission has deemed the current labels to be legible and conspicuous.

Perhaps more fundamental, warning requirements of this magnitude raise constitutional concerns. As the American Civil Liberties Union testified regarding similar warning requirements pending before the House Subcommittee on Health and the Environment just last year, the requirements "go so far beyond reasonable regulation that they impose an unconstitutional burden on the speech chosen by commercial advertisers."

IV. False Assumptions: Tobacco Products and Minors

The provisions of S. 1088 regarding use of tobacco products by minors, while well-intentioned, are based on false assumptions. The bill contains a purported "finding" that "the tobacco industry contributes significantly to experimentation with tobacco and the initiation of regular tobacco use by children and young adults through its advertising and promotion practices." The fact of the matter is, however, that research studies by tobacco critics have consistently found that tobacco advertising and promotion have no significant impact on the initiation of tobacco use. The following studies are of particular interest with regard to the issue of smokeless tobacco use by youth:

- In a paper published in the American Journal of Public Health in 1986, Marty and his colleagues reported on their study of 901 high school students in northwest Arkansas. Those students who reported using smokeless tobacco

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were asked about the primary influence in their initiation of smokeless tobacco use. 82.7 percent of the respondents reported that the primary influence was one of the following: a friend, a relative other than a parent, a teacher, a coach, or a parent. Only one respondent, comprising 0.6 percent of the group, reported that an advertisement was the primary influence. Marty, P.J., et al., Patterns of Smokeless Tobacco Use in a Population of High School Students. AJPH 76 (2): 190-192, 1986.

- In a second study based in Arkansas, Williams and his colleagues reported on their work with over 1200 students at 13 rural Arkansas high schools. Those students who reported using smokeless tobacco were asked "who/what was the single most significant influence in your decision to begin using smokeless tobacco?" The researchers noted that "a strong parental influence was evident in the reason most frequently cited for deciding to use smokeless tobacco." Indeed, 57.1 percent of the respondents answered "a parent"; 32.7 percent answered "a coach"; and 9.2 percent responded "a teacher". Again, only a single respondent, comprising 0.5 percent of the group, indicated that "an advertisement" was the most significant influence. The researchers concluded that "the youth surveyed in this study did not report advertising to be instrumental in the initiation of product use." Williams, T., et al., Smokeless Tobacco Use Among Rural High School Students in Arkansas. J Sch Health 56(7): 282-285, 1986.
- Guggenheimer and his colleagues published a study in the American Journal of Public Health in 1986 in which they reported on a group of 609 students in the Pittsburgh area. Those students who reported using smokeless tobacco were questioned as to what influenced them to use the products. The researchers reported that "although mass media and other marketing efforts to promote smokeless tobacco have intensified, only 4 percent of the users admitted to being so influenced, whereas 60 percent reported learning about the products from a friend." Guggenheimer, J., et al., Changing Trends of Tobacco Use in a Teenage Population in Western Pennsylvania. AJPH 76 (2): 196-197, 1986.

Furthermore, the provisions of S. 1088 regarding use of tobacco products by minors are redundant given our industry's own efforts both to ensure that smokeless tobacco products are not marketed to persons under the age of eighteen, and to support state laws which prohibit the sale of tobacco products to persons under the age of 18. As to the few states that permit the sale of tobacco products to persons under the age of eighteen, there are adequate measures already in place to encourage these states to adopt appropriate legislation. For example, the Comprehensive Act provides that "the Secretary of Health and Human Services may provide technical assistance and may make grants to States . to establish 18 as the minimum age for the purchase of smokeless tobacco."

Our industry's determination and common cause with the Department of Health and Human Services in this area is underscored by the fact that the Smokeless Tobacco Council has drafted and made available to state legislatures a model statute which establishes 18 as the minimum age for purchase of smokeless tobacco products. The model statute provides, in part:

> Sec. 1. Sale of Smokeless Tobacco Products—It shall be unlawful for any person, firm, corporation, partnership, or any other entity engaged in the sale of smokeless tobacco products to knowingly sell, barter, give, or in any other way furnish to a person under the age of eighteen (18) years any smokeless tobacco products, including chewing tobacco, snuff, or any other form of smokeless tobacco.
>
> Sec. 2. Purchase of Smokeless Tobacco Products—It shall be unlawful for any person under the age of eighteen (18) years to purchase, barter, or in any other way receive from any person, firm , corporation, partnership, or any other entity engaged in the sale of smokeless tobacco products any smokeless tobacco product, including chewing tobacco, snuff, or any other form of smokeless tobacco.

V. Impact of S. 1088 on Tobacco Farmers and Manufacturers

Smokeless tobacco manufacturers have developed a close relationship with domestic tobacco farmers, and a deep appreciation for the unique agricultural practices which generations of our farmers have utilized.

Under S. 1088, tobacco products would be subject to an extensive regulatory regime which could encompass tobacco growing as well as the tobacco product manufacturing process. Current tobacco growing and curing practices could be radically altered due to new requirements in the bill. As a result, the bill holds substantial implications for tobacco farmers.

The Environmental Protection Agency and the U.S. Department of Agriculture already regulate the tobacco growing process. S. 1088 could impose new restrictions and significant new costs on American tobacco farmers and processors.

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VI. S. 1088 Lacks a Balanced Approach to Education

Subtitle B of S. 1088 provides a vehicle for private antitobacco advocates to obtain Federal funds for "public information campaigns." These programs would be directed at target groups whom anti-tobacco advocates apparently believe are unable to make their own adult decisions, or who perhaps are thought to be making the "wrong" decisions. Among the targeted groups would be "minorities", "blue collar workers", "school dropouts", and "low income individuals." Federal funds would also be used to develop programs aimed at "workers and their families" involving "a concentration of effort to change tobacco use behavior in those groups."

Providing information intended to permit adults to make an informed decision whether to use tobacco products is one thing. Engaging in Federally funded persuasional programs aimed at effecting "behavior change" in "minorities [and] blue collar workers" is quite another, and accordingly must be rejected.

We believe American adults should be allowed to exercise their informed freedom of choice to use these legal tobacco products. The claimed health risks of smokeless tobacco use are universally known, and congressionally-mandated information on this subject appears in smokeless tobacco advertisements and on every smokeless tobacco package. Consumers should be allowed to evaluate this information and decide, without coercion or restrictions, whether to use tobacco products. While we will continue our efforts to ensure that smokeless tobacco products are not marketed to persons under the age of eighteen, we also will vigorously oppose any effort to infringe upon the rights of adult citizens who choose to use our products.

VII. S. 1088 Would Undermine the Principle of Nationally Uniform Regulation of Tobacco

Section 2758 of S. 1088 is an ill-advised attack on a fundamental principle underlying Federal regulation of tobacco products. It has long been recognized that the regulation of tobacco products, which are marketed and used nationwide, must be carried out on a nationally uniform basis. Thus, the Comprehensive Act put into place a nationally uniform program for the regulation of smokeless tobacco.

Mr. Chairman, Section 2758 would undermine this well established principle by permitting, and even encouraging, state and local authorities to enact diverse and inconsistent regulations regarding smokeless tobacco advertising, sale and promotion. Moreover, since anti-tobacco activists have declared their intention to seek outright bans of local tobacco advertising on billboards or transit advertising, Section 2758 would be in direct conflict with First Amendment protection of commercial speech.

Mr. Chairman, when considering the implications of S. 1088 for tobacco labeling and advertising, the recent examination of this issue by our neighbors to the North is instructive. In 1988 the Canadian Parliament enacted the Tobacco Product Control Act, which sought to prohibit many forms of tobacco advertisements and to impose tobacco product warning labels of dimensions similar to those included in S. 1088. The Canadian legislation was challenged in court. After an exhaustive and comprehensive trial which lasted thirteen months, the Quebec Superior Court rejected the law as "state moralism." The prudence of the court's language extends beyond national boundaries—the legislation was a form of censorship and social engineering which is incompatible with the very essence of a free and democratic society."

S. 1088 would even provide Federal funding for these unconstitutional state and local restrictions on commercial speech, as well as funding private counter-advertising. In short, S. 1088 seeks to employ the power of the Federal government to attack the First Amendment rights of smokeless tobacco manufacturers, as well as to sweep aside traditional and fundamental notions of balance in the regulation of commerce tobacco.

In conclusion, Mr. Chairman, the passage of S. 1088 would undermine Congress' own recent efforts to establish a comprehensive Federal framework of smokeless tobacco regulation. The Comprehensive Act established a broad system of regulation for smokeless tobacco products, including educational programs, package warnings, and ingredient and nicotine reporting. S. 1088 would wipe out this comprehensive plan and instead impose a redundant and unwarranted new system. It is imperative we take the time to evaluate the effectiveness of the Comprehensive Act before any additional burdens are placed on the taxpayer under the guise of tobacco "regulation."

Finally, S. 1088 raises an issue which is fundamental in our democratic and free enterprise society with its many constitutional and legal protections against excesses. It is disingenuous for the proponents to label this bill as a regulatory proposal, when in fact its purposes and theirs are clear: the cessation of tobacco use and the creation of a "tobacco free society." In reality the bill creates a new federal

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bureaucracy by which anti-tobacco proponents would preside over the ultimate demise of the industry with which they would be charged with "regulating."

The smokeless tobacco industry is an honorable one. Over the years we have demonstrated that we are a responsible and reasonable industry. As we have done during consideration of previous legislation regulating our tobacco products, we will work conscientiously to avoid divisive discourse and take a fairminded approach to this complex issue. Nevertheless, we are resolved to protect our right to manufacture and market quality smokeless tobacco products to our adult consumers in a responsible manner.

Thank you, Mr. Chairman, for the opportunity to present these views to the committee.

[The Appendix to this statement may be found in the committee files.]

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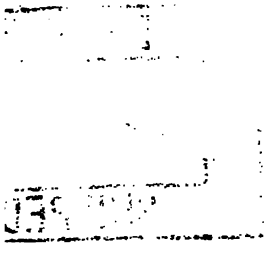

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